FEDERAL MARITIME COMMISSION

DOCKET NO. 81-11

"50 MILE CONTAINER RULES"
IMPLEMENTATION BY OCEAN COMMON CARRIERS
SERVING U.S. ATLANTIC AND GULF COAST PORTS

Ocean common carriers' publication and implementation of "50 Mile Container Rules" found to be unreasonable and violative of the Shipping Act, 1916, the Shipping Act of 1984 and the Intercoastal Act, 1933.

Opponents of the Rules not required to prove specific financial harm in order for the Rules to be found unlawful.

The Commission not required by statute or case law to attempt to weigh "labor considerations" in adjudicating possible Shipping Act violations; on the contrary, to do so would frustrate intent of Congress in enacting Maritime Labor Agreements Act of 1980.

The appropriate role for "labor considerations" is in the choice of remedy for Shipping Act violations; here, effective date of cease and desist order against further enforcement of the Rules on Containers will be delayed for 90 days so that respondent carriers can conform collective bargaining obligations with requirements of the Shipping Acts.

Dennis N. Barnes for respondent Moller Steamship Co.
James W. Pewett and Russell T. Weil for respondent Central Gulf Lines, Inc.
Frederick L. Shreves for respondent Dart Containerline Company, Ltd.
William Karas for respondents Atlantic Container Line Ltd. and Puerto Rico Maritime Shipping Authority.
David N. Dunn, Charles F. Warren and George A. Quadrino for respondents Japan Line, Ltd., Kawasaki Kisen Kaisha, Ltd., Mitsui O.S.K. Lines, Ltd., Nippon Yusen Kaisha and Yamashita Shinnihon Steamship Co., Ltd.
Seymour H. Kligler and David A. Brauner for respondents Empresa Lineas Maritimas Argentinas, S.A., Orient Overseas Container Line, and South African Marine Corp., Ltd.
Richard A. Hagan and Peter J. King for respondent Companhia de Navegacao Lloyd Brasileiro.

Robert J. Remmer for respondent Coordinated Caribbean Transport, Inc.

John P. Love for respondents American Atlantic Lines and Pan Atlantic Lines.

John H. Dougherty and Neal M. Mayer for respondent Trans Freight Lines, Inc.

Robert S. Zuckerman, Oliver J. Trytell and John M. Ridlon for respondent Sea-Land Service, Inc.

William P. Verdon, Thomas D. Shea and Daniel W. Lenehan for respondent United States Lines, Inc.

Stanley O. Sher for respondents Costa Line, Hapag-Lloyd Aktiengesellschaft, Italian Line and Nedlloyd Lines.

Richard E. Hull for respondent Transporte Navieros Ecuatorianos (TRANSNAVE).

Derek A. Walker for respondent Venezuelan Line.

R. Lawrence Kurt for respondent Lykes Bros. Steamship Co., Inc.

C. P. Lambos and Donato Caruso for intervenor New York Shipping Association, Inc., and for respondents American Atlantic Lines, Associated Container Transportation (U.S.A.) - Pacific America Container Express, The Bank Line Limited, Barber Blue Sea Line, Coordinated Caribbean Transport, Galleon Shipping Corp., Jugolinija, Koctug Line, Linea Manaure, C.A., Maersk Line, Moore McCormack Lines, Inc., Polish Ocean Lines, Torm Lines, Waterman Steamship Corp. and Yangming Marine Transport Corp.

R. Frederic Fisher for intervenor Pacific Maritime Association.

Francis A. Scanlan for intervenor Council of North Atlantic Shipping Associations.

Raymond P. deMember for intervenors International Association of NVOCCs and The Florida Custom Brokers & Forwarders Association.

Thomas W. Gleason and Ernest L. Mathews, Jr., for intervenor International Longshoremen's Association, AFL-CIO.

Gerald H. Ullman for intervenor National Customs Brokers & Forwarders Association of America, Inc.

William H. Towle for intervenor American Warehousemen's Association.

J. Alan Lips and Kevin M. Williams for intervenor American Trucking Associations, Inc.

Charna J. Swedarsky, John Robert Ewers, Aaron W. Reese and Vern W. Hill for Bureau of Hearing Counsel.

REPORT AND ORDER

BY THE COMMISSION: (Edward V. Hickey, Jr., Chairman; James J. Carey, Vice Chairman; Thomas F. Moakley, Francis J. Ivancie and Edward J. Philbin, Commissioners).

INTRODUCTION

In this proceeding, the Federal Maritime Commission ("FMC" or "Commission") again confronts, in the words of the Supreme Court, the "difficult and complex problems" posed by the "Rules on Containers" (sometimes known as the "50 Mile Rules"). NLRB v. International Longshoremen's Association, 447 U.S. 490, 512 (1980). Under the Rules, ocean common carriers providing service in the domestic offshore and foreign commerce of the United States, from Atlantic and Gulf Coast ports, have placed certain restrictions and conditions on their transportation of containerized cargoes. The restrictions and conditions required by the Rules on Containers are not necessitated by and do not depend upon the nature or transportation needs of a particular shipment of cargo, or upon the operational requirements of the carriers. Rather, the Rules apply as a result of collective bargaining agreements between the carriers and their deepsea longshore employees, represented by the International Longshoremen's Association ("ILA").

It now is established that these underlying agreements between the carriers and the ILA are lawful under the federal labor statutes because they represent efforts to preserve work historically performed by longshoremen against inroads from containerization and related technological advances. The Commission has neither personal jurisdiction over the ILA nor subject matter jurisdiction over the union's collective bargaining agreements with the carriers,

and this investigation raises no issue regarding the lawfulness of the agreements.

However, to fulfill their side of the collective bargaining agreements, the carriers, which are within the Commission's jurisdiction, have incorporated the Rules on Containers into their tariffs, as they are requited to do by the Shipping Act, 1916 ("1916 Act"), 46 U.S.C. § 801 et seq. (1982), its successor, the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. § 1701 et seq., and the Intercoastal Shipping Act, 1933 ("Intercoastal Act"), 46 U.S.C. § 843 et seq. (1982).[1] The Rules thus became part of the carriers' terms of contract with cargo shippers and other persons. The task before the Commission is to determine whether, despite their lawfulness as collective bargaining provisions under the federal labor laws, the Rules or, more precisely, the carriers' practices described by the Rules, violate the maritime statutes' prohibitions against unjust discrimination and unreasonable practices in their publication and operation as ocean cargo tariffs.

For the reasons set forth below, the Commission finds that certain provisions of the Rules on Containers are indeed unreasonable and unjustly discriminatory and therefore violate the 1916 Act, the 1984 Act and the Intercoastal Act. We therefore reverse the Initial Decision

---

[1] For ease of discussion, these statutes will be referenced collectively as "the Shipping Acts," except where a specific citation is necesssary.

("I.D.") issued on February 13, 1985, by former Chief Administrative Law Judge John E. Cograve ("Presiding Officer"), which found no violations of law.

Evidence sufficient to find violations of the Shipping Acts can be found in the provisions of the Rules themselves, which are facially discriminatory and burdensome as applied to certain classes of shippers and cargo consolidators. These discriminations and burdens are not justified by transportation circumstances properly cognizable under the Shipping Acts. The evidence provided by the text of the Rules themselves is supported by other evidence of record provided by shippers, warehousemen and consolidators, who testified that the carriers' application of the Rules resulted in specific instances of lost business, unnecessary costs and other types of economic harm to them traceable to the Rules. The criticisms of the I.D. of the testimonial evidence, for the most part, were factually wrong or stemmed from a stringent ad hoc probative standard, the application of which was neither supported by law nor justified as a matter of fairness. The total quantum of evidence against the Rules in this case surpasses in some respects the record in Sea-Land Service, Inc. and Gulf Puerto Rico Lines, Inc. - Proposed Rules on Containers, 21 F.M.C. 1 (1978), where the Commission found the Rules unlawful as applied to the Puerto Rico domestic offshore trade. In its review of that decision, the U.S. Court of Appeals for the District of Columbia Circuit did not question the adequacy of the evidence supporting the Commission's findings.

In reaching this decision, the Commission rejects the arguments of certain parties that, in determining the lawfulness of the Rules on Containers under the ocean transportation statutes the Commission is responsible for enforcing, we are obliged to reach beyond those statutes and attempt to take into account evidence of "labor considerations" stemming from the collective bargaining agreements between the carriers and the ILA. After a searching analysis of the applicable statutes and case law, the Commission has concluded that no such obligation is placed upon us. On the contrary, our review of the twenty-year history of efforts by this agency, the National Labor Relations Board ("NLRB"), the courts and Congress to reconcile the demands of the federal maritime and labor statutes indicates that any effort by the Commission to balance "labor considerations" against the clear evidence of unreasonable transportation burdens and discriminations before us would represent a failure by the Commission to discharge the duties assigned to us by Congress, and would undermine the balance between labor and shipping interests devised by Congress when it enacted the Maritime Labor Agreements Act of 1980, Pub. L. No. 96-325, 94 Stat. 1021. We believe that our responsibility to take "labor considerations" into account is limited to ensuring that the appropriate remedy for violations of the Shipping Acts is drawn no more broadly than necessary, so as to avoid any unwarranted impact on the legitimate collective bargaining interests of the carriers and the union.

Because civil penalties are not an issue in this proceeding, the remedy for the violations of law the Commission has found will be an order that the carriers cease and desist from publishing in their tariffs and enforcing the relevant provisions of the Rules on Containers. The effective date of the order will be delayed for 90 days from the date of this decision, in order to give the carriers a reasonable amount of time to conform their collective bargaining arrangements with the requirements of the shipping laws. The Commission does not take this step casually, because it requires us to countenance 90 more days of continuing violations of the Intercoastal Act and the 1984 Act with the accompanying burdens upon shippers and other affected persons. However, we are persuaded that this is a reasonable accommodation of the carriers' interests in maintaining a stable relationship with their longshore employees.[2]

The history of this proceeding, the analysis of the Presiding Officer as set forth in his I.D. and the positions of the parties on Exceptions can best be understood if they are viewed in their places as the latest developments in the long chronology of the role of federal labor law in

---

[2] Rule 8 of the Rules on Containers contemplates a 60-day period for renegotiation if any part of the present agreements between the carriers and the ILA is declared unlawful. Thus, the remedy devised by the Commission allows a full opportunity for renegotiation and also gives the carriers an additional 30 days to take whatever steps are then necessary.

regulation by the Commission under the Shipping Acts, and of the relevant decisions by the courts, the FMC and the NLRB regarding the Rules on Containers. We begin by recounting the history and nature of the Rules themselves.

I. The Origin and Development of the Rules on Containers [3]

Prior to the advent of what has come to be termed "the container revolution," the movement of ocean-borne cargo across the port piers contained two distinct stages. Truckers delivered loose or "break-bulk" export cargo to the terminal at the head of the pier. Longshoremen employed by ocean carriers or stevedoring companies then transferred the cargo piece by piece from the tailgate of the truck to the hold of the outgoing ship, checking it, sorting it, placing it on pallets, moving it by forklift to the side of the ship, and lifting it into the ship's hold. This process worked in reverse with regard to import cargo on incoming ships, with the longshoremen removing the cargo from the ship piece by piece and transporting it to the tailgate of the truck, from which point truckers would deliver it (sometimes through intermediate warehouses) to the ultimate consignee.

---

[3] This section of the Commission's report draws heavily on American Trucking Associations, Inc. v. NLRB, 734 F.2d 966 (4th Cir. 1984), aff'd sub nom. NLRB v. International Longshoremen's Association, 473 U.S. 61 (1985), and on NLRB v. International Longshoremen's Association, 447 U.S. 490 (1980).

Following World War II, steamship carriers operating between New York and Puerto Rico began to carry cargo in small (8' x 8' x 8') reusable wooden receptacles called "Conex" and "Dravo" boxes. Initially, these boxes - the forerunners of the modern container - were "stuffed" (loaded) and "stripped" (unloaded) exclusively at the pier by ILA labor. Later, however, steamship companies made the boxes available to shippers and others for stuffing and stripping off-pier by non-ILA labor. By the mid-1950's, larger metal containers began to replace the wooden boxes. In 1958, the first "containership" appeared in the New York-Puerto Rico domestic offshore trade, designed specifically to move containers that ultimately would range up to forty feet in length.

From the early days of containerization, its economic advantages to carriers and shippers were clear. The Supreme Court described them as follows:

> The use of containers is substantially more economical than traditional methods of handling ocean-borne cargo. Because cargo does not have to be handled and repacked as it moves from the warehouse by truck to the dock, into the vessel, then from the vessel to the dock and by truck or rail to its destination, the costs of handling are significantly reduced. Expenses of separate export packaging, storage, losses from pilferage and breakage, and costs of insurance and processing cargo documents may also be decreased. Perhaps most significantly, a container ship can be loaded or unloaded in a fraction of the time required for a conventional ship. As a result, the unprofitable in-port time of each ship is reduced, and a smaller number of ships are needed to carry a given volume of cargo.

NLRB v. International Longshoremen's Ass'n, 447 U.S. 490, 494-95 (1980) (footnotes omitted). Because of these advantages, steamship carriers embarked upon a massive investment program in automated shipping operations. Billions of dollars were spent for the design and construction of container vessels and for the purchasing or leasing of hundreds of thousands of ocean containers. Carriers, stevedores and terminal operators developed modern container terminals equipped with cranes, heavy forklifts and other machinery required for the handling of container traffic.

By 1959, containerization had begun to make inroads into traditional longshore work. In that year, the first set of collective bargaining negotiations to address the labor issues raised by containerization began. These negotiations between the ILA and the New York Shipping Association ("NYSA"), an employer organization, opened with the union demanding that all containers be stripped and stuffed at the pier by the longshoremen. Ultimately, however, the ILA conceded that any member of NYSA "shall have the right to use any and all type[s] of containers without restriction or stripping by the union." American Trucking Associations, Inc. v. NLRB, 734 F.2d 966, 970 (4th Cir. 1984), aff'd sub nom. NLRB v. International Longshoremen's Association, 473 U.S. 61 (1985). In return, NYSA agreed to pay the ILA royalties on containers stripped or stuffed away from the pier by non-ILA labor. NYSA also agreed that:

> Any work performed in connection with the loading and discharging of containers for employer members of NYSA which is performed in the Port of Greater New York whether on piers or terminals controlled by them, or whether through direct contracting out, shall be performed by ILA labor at longshore rates.

Id.

Despite the 1959 agreement, grievances, work stoppages and wildcat strikes occurred for most of the next decade. At least in part, this state of affairs stemmed from different interpretations by the parties of the 1959 agreement. The ILA claimed that it had agreed to permit the free movement over the pier of only those containers that were "full shipper loads" ("FSLs") - i.e., containers holding goods beneficially owned by only one shipper or consignee. With respect to consolidated loads (also called "less than trailer loads" ("LTLs"), or "less than container loads" ("LCLs")) - i.e., containers holding goods belonging to more than one shipper or consignee - the ILA contended that it had retained the right to have its members stuff and strip such containers at the pier. The union's concern was focused on off-pier consolidation facilities, which were now beginning to emerge. NYSA, on the other hand, claimed that the agreement essentially left its members free insofar as consolidated loads were concerned, provided they made royalty payments on any loads not handled by ILA labor. The unrest generated by this conflict led NYSA to make this 1962 concession:

> Where a employer-member of NYSA supplies a container which is the property of such member, to

> a consolidator for loading or discharging of cargo in the Port of Greater New York, it will be stipulated that such container must be loaded or unloaded by ILA at longshore rates.

American Trucking Associations, Inc. v. NLRB, supra, at 970.

Throughout the 1960's, containerization assumed an increasingly prominent role on the waterfront. By 1967, containerized cargo constituted 20 percent of all cargo handled in the Port of New York. That year also marked the introduction of the first containership into the important North Atlantic trade route, which previously had been served exclusively by conventional vessels.

With contract negotiations scheduled for the summer of 1968, the ILA in July 1967 adopted a resolution demanding once again that all containers be stuffed and stripped by its members. NYSA countered with a demand that all existing restrictions on the free movement of containers be eliminated. A strike ensued, lasting 57 days in the Port of New York and about twice that long in other Atlantic and Gulf ports. Only the appointment of a Presidential Board of Inquiry, pursuant to the emergency provisions of the Taft-Hartley Act, brought the parties back to the bargaining table.

Out of this atmosphere, the Rules on Containers emerged in January, 1969. At that time, the Rules essentially provided that if containers owned or leased by the carriers carrying consolidated LTL or LCL loads were to be stuffed or

stripped within a radius of 50 miles of the local port area[4] by anyone other than the employees of the beneficial owner of the cargo - that is, by employees of consolidators, warehousemen, etc. - the work instead must be performed at the piers by ILA labor. The Rules also contained a liquidated damages provision for any container handled in violation of the Rules, and required the carriers to pay a royalty on any container that passed over the pier intact. It seems to be generally accepted that, as a practical matter, the agreement preserved only about 20 percent of the containerized cargo to the longshoremen for stuffing and stripping, with the remaining 80 percent passing over the piers intact. The terms of the 1969 master agreement were adopted by other ports on the Atlantic Coast, including Hampton Roads and Baltimore. In 1970, the liquidated damages provision was increased to $1,000 per violation. In 1971, after another strike, the ILA and the Council of North Atlantic Shipping Associations ("CONASA"), a new multi-employer bargaining association representing the carriers, renewed the 1969 Rules in virtually identical form.

Despite the existence of the Rules, the ILA maintained that the carriers continued to permit and even encourage violations of them. The union therefore threatened to invoke its right to suspend the Rules, which would mean that

---

[4] At each port covered by the Rules, the 50-mile radius extends from a point specified by the Rules themselves. For example, in New York, the point is Columbus Circle.

the longshoremen might refuse to handle any container that was or was meant to be stripped or stuffed inland. The parties met in Dublin, Ireland in January, 1973, and executed an "interpretive bulletin" to the Rules designed to ensure their effective enforcement. The "Dublin Supplement" - as the bulletin came to be called - declared that the Rules applied to all containers - including FSL containers - that were stuffed or stripped within 50 miles of the port area by anyone other than the beneficial owner's employees. This brought within the ambit of the Rules FSL containers that, although destined for delivery intact to their consignees, were stopped short of their ultimate destinations and stripped at warehouses or trucking stations within the 50-mile zone. The parties agreed to except any FSL container that would be warehoused within the 50-mile zone for a minimum of 30 days. The Dublin Supplement also prohibited the carriers from making their containers available to consolidators.[5] This prohibition had long been sought by the ILA, which regarded containers as extensions of the hold of the ship and thus part of its members' historical work area.

---

[5] Rule 1(E) of the Rules on Containers states that the carriers shall not supply their containers "to any consolidator or deconsolidator." The prohibition is not limited, on its face, to consolidators located within the 50-mile zone; however, it has been so interpreted. E.g., NLRB v. International Longshoremen's Association, 447 U.S. 490, 498-99 (1985). At a minimum, the provision is ambiguous.

At the conclusion of their 1974 negotiations, the parties agreed to retain the Rules as interpreted by the Dublin Supplement. The ILA continued to claim, however, that there were recurring violations of the Rules by the carriers. In April, 1975, the union suspended the Rules, and longshoremen stripped all containers at the pier except FSLs. After a month, however, the parties settled the dispute by eliminating the 30-day warehouse exception as it applied to export cargo and tightening it with regard to import cargo. In October and November, 1977, the ILA again went on strike because of the continued impact of containerization during a period when the Rules were enjoined. A settlement was reached whereby the carriers agreed to defend vigorously the lawfulness of the Rules and to create a new job security program intended to protect carrier contributions to ILA fringe benefit plans. The parties have agreed to retain the Rules in substantively unchanged form ever since, most recently in the collective bargaining negotiations completed in October, 1986. Employer signatories to the collective bargaining agreements with the ILA have included the West Gulf Maritime Association, the Southeast Florida Employers Association and the Mobile Steamship Association; the Rules thus apply along the full range of the Atlantic and Gulf Coasts, although there are individual ports at which the Rules do not apply because the ILA does not have collective bargaining jurisdiction.

The Presiding Officer found that, as of April 1983, an ILA dockworker was paid $14.00 per hour, plus $10.00 in fringe benefits. The cost to the steamship lines for a longshoreman's salary, plus fringe benefits for hospitalization, welfare and pension, was between $40,000 and $45,000 per year for a 40-hour week. Longshoremen received six weeks' vacation, 16 paid holidays and $25,000 of life insurance. In addition, the ILA membership had a Guaranteed Annual Income ("GAI") Program, a Job Security Program and container royalty payments (it is our understanding that certain reductions in these benefits were included in the 1986 contract). The GAI Program paid an unemployed ILA member $35,000 per year, with six weeks vacation and fringe benefits. However, GAI benefits are not uniform and payments at South Atlantic and Gulf ports were lower. The ocean carriers paid container royalties of $3.00/ton on containers not stripped or stuffed by ILA labor, including containers originating from or destined to points outside the 50-mile limit. Two-thirds of the royalties went to Christmas bonuses, which in New York were between $1,500 and $1,800 per person.[6]

II. The Rules on Containers

This investigation concerns the lawfulness of those provisions of the current Rules on Containers that apply to

---

[6] I.D. at 28-29.

shippers, consolidators and other persons who did not participate in the collective bargaining between the ILA and the carrier respondents, but whose cargo or businesses nevertheless are affected as a consequence of the carriers' incorporation of the Rules into their tariffs.[7] The fundamental purpose of these provisions is to require cargo that does not qualify for any of the Rules' various exceptions to be delivered loose to the piers so that it can be loaded into or unloaded from containers in the first instance by ILA longshoremen. On import shipments, the carriers are in a position to ensure that this objective is attained by having non-excepted cargo unloaded at the pier in loose form. However, on export shipments, it is possible that non-excepted cargo may arrive at the pier already loaded in containers. Under such circumstances, the container must be stripped at the pier and then restuffed in order to achieve the Rules' objective of work for longshoremen.[8]

The relevant provisions of the Rules are set out below. It will be seen that whether particular cargo is excepted from the Rules, or instead is subjected to their requirements, has little

---

[7] Boston Shipping Association, Inc. v. FMC, 706 F.2d 1231 (1st Cir. 1983), upheld the Commission's decision that Rule 10 of the Rules on Containers did not unfairly discriminate against the Port of Boston or otherwise violate the Shipping Act, 1916. Rule 10 governs the collection and distribution to ILA members of container royalties. It does not apply to shippers or consolidators and is not under review in this proceeding.

[8] I.D. at 7.

relation to the nature or transportation requirements of the cargo itself, but rather is the product of the bargaining give-and-take over the years between the carriers and the union.

Definitions

* * *

(f)	Qualified Shipper	-	means the manufacturer or seller having a proprietary financial interest (other than in the transportation or physical consolidation or deconsolidation) in the export cargo being transported and who is named in the dock/cargo receipt.
(g)	Qualified Consignee	-	means the purchaser or one who otherwise has a proprietary financial interest (other than in the transportation or physical consolidation or deconsolidation) in the import cargo being transported and who is named in the delivery order.
(h)	Consolidated Container Load	-	means a container load of cargo where such cargo belongs to more than one shipper on export cargo or one consignee on import cargo.

RULE 1 - CONTAINERS TO BE LOADED OR DISCHARGED BY DEEPSEA ILA LABOR

A) Cargo in containers referred to below shall be loaded into or discharged out of containers only at a waterfront facility by deepsea ILA labor:

1. Containers owned, leased or used by carriers[9] . . . which contain consolidated container loads, which come from or go to any point within a geographic area of any Management Port described by a 50-mile circle with its radius extending out from the center of each port . . ., (hereinafter "geographic area") . . . or

2. Containers which come from a single shipper which is not the manufacturer ("Manufacturer's label") into which the cargo has been loaded (consolidated) by other than its own employees and such containers come from any point within the "geographic area," or

3. Containers designated for a single consignee from which the cargo is discharged (deconsolidated) by other than its own employees within the "geographic" area and which is not warehoused in accordance with Rule 2(b).

* * *

C) All export consolidated cargo, described in 1(A)(1) and (2) above, shall be received at the waterfront facility by deep-sea ILA labor and such cargo shall be loaded into a container at the waterfront facility for loading aboard ship.

D) All import consolidated cargo described in 1(A)(1) and (3) above, shall be discharged from the container and the cargo placed on the waterfront facility where it will be delivered and picked up by each consignee.

E) No carrier or direct employer shall supply its containers to any consolidator or deconsolidator. No carrier or direct employer shall operate a facility in violation of the Rules on Containers which specifically require that all Rule 1 containers be loaded or discharged at a waterfront facility.

---

[9] Although the phrase "[c]ontainers . . . used by carriers" appears to include containers that are owned or leased by shippers, the carriers and the ILA claim that this was not their intention. Rule 1(A)(1) thus is ambiguous on this point. I.D. at 63.

RULE 2 - CONTAINERS NOT TO BE LOADED OR DISCHARGED BY ILA LABOR

Cargo in containers referred to below shall not be loaded or discharged by ILA labor:

A) Export Cargo:

1. All cargo loaded in containers outside the "geographic area."

2. Containers loaded with cargo at a qualified shipper's facility with its own employees.

3. Containers loaded with the cargo of a single manufacturer (Manufacturer's label) at its facilities with its own employees.

4. Consolidated container loads of mail, household effects of a person who is relocating his place of residence, with no other type of cargo in the container, or personal effects of military personnel.

5. There shall be no general warehouse exception applicable to export cargo.

B) Import Cargo:

1. All cargo discharged from containers outside the "geographic area."

2. Containers discharged at a qualified consignee's facility by its own employees.

3. Consolidated container loads of mail, household effects of a person who is relocating his place of residence, with no other type of cargo in the container, or personal effects of military personnel.

4. Containers of a qualified consignee discharged at a bona fide public warehouse within the "geographic area" which comply with all of the following conditions:

    1. The container cargo is warehoused at a bona fide public warehouse;

    2. The qualified consignee pays the normal labor charges in and out; and the normal warehouse storage fees for a minimum period of thirty or more days; and stores the cargo for a minimum period of 30 days; and

3. The cargo being warehoused (a) in the normal course of the business of the qualified consignee; (b) title to such goods has not been transferred from the qualified consignee to another.

* * *

RULE 7 - NO AVOIDANCE OR EVASION

The above rules are intended to be fairly and reasonably applied by the parties. To obtain non-discriminatory and fair implementation of the above, the following principles shall apply:

* * *

(C) Liquidated Damages - Failure to load or discharge a container as required under these rules will be considered a violation of the contract between the parties. Use of improper, fictitious or incorrect documentation to evade the provisions of Rule 1 and Rule 2 shall also be considered a violation of the contract. If for any reason a container is no longer at the waterfront facility at which it should have been loaded or discharged under the Rules, then the carrier or its agent or direct employer shall pay, to the joint Container Royalty Fund, liquidated damages of $1,000 per container which should have been loaded or discharged. If any carrier does not pay liquidated damages within 30 days after exhausting its right to appeal the imposition of liquidated damages to the Committee provided in Rule 9(a) below, the ILA shall have the right to stop working such carrier's containers until such damages are paid.[10]

(D) Any facility operated in violation of the Container Rules will not have service supplied to it by any direct employer and the ILA will not supply labor to such facility.

---

[10] While the Rules do not require that liquidated damages paid by a carrier shall be passed on to shippers or other persons, at the same time the Rules do not prohibit a carrier from doing so. At least one carrier respondent apparently notified trucking companies in the Hampton Roads area that it would require reimbursement for any damages it paid. I.D. at 65, n. 49.

III. The Shipping Acts and National Labor Policy

The paramount issue before the Commission is whether, in judging the lawfulness under the Shipping Acts of the above provisions of the Rules on Containers, we must or should take into account "labor considerations," however those are defined. The analysis of the Presiding Officer, the result of the I.D. and the arguments of the contending parties all turn on that question. This part of the Commission's report recounts the long and complex history of the efforts by the Commission, the courts and Congress to reconcile national labor policy with the maritime statutes' prohibitions against unjust discrimination and unreasonable cargo handling practices. Our purposes are (1) to demonstrate the precise nature and limits of the courts' and Congress' concern over the possible impact of FMC regulation on national labor policy; (2) to derive appropriate standards for interpretation of the specific sections of the Shipping Acts applicable to the Rules on Containers; and (3) to define the actual labor interests embodied in the Rules.

The parties' pleadings and the I.D. made it clear that it was necessary to go back twenty years to the first court decisions defining FMC jurisdiction over labor-related maritime activities. The applicability and proper interpretation of these early cases remain subjects of controversy, even though the results of some of them eventually were undone by legislation. While the

Commission's 1978 decision regarding the Rules on Containers as they applied in the domestic offshore Puerto Rican trade and the review of that decision in 1982 by the U.S. Court of Appeals for the District of Columbia Circuit are included in the discussion below, the cases analyzed also focus more generally on agreements and other activities by FMC-regulated persons stemming from collective bargaining agreements.

This history is set forth in strict chronological order, in the belief that that is the best aid to analysis and understanding. The institution of this proceeding in early 1981 will be described in its proper place. To provide the greatest possible assistance to the parties and the public, and to make clear the basis for our ultimate conclusions, we have quoted extensively from the various court decisions and Congressional hearings. We also have included, where appropriate, the Commission's comments regarding the significance of a decision or other development for the current proceeding. Some of these comments are frankly critical of past failures by the Commission to maintain a consistent posture toward labor issues or to articulate clearly our rationale for a particular decision. With this history as a backdrop, we then shall analyze the I.D. and the parties' positions on the labor issue and set forth our conclusions.

A. The "Volkswagen" Decision

Regulation by the Commission of labor-related maritime agreements and activities became an important issue for the first time as a result of Volkswagenwerk v. FMC, 390 U.S. 261 (1968) ("Volkswagen"). Prior to that decision, the Commission generally had resisted the notion that it had jurisdiction over such matters. The case grew out of a collective bargaining agreement reached in late 1960 between the Pacific Maritime Association ("PMA"), an organization of ocean common carriers and other employers of maritime labor (similar to NYSA and CONASA), and the International Longshoremen's and Warehousemen's Union ("ILWU"), which is the controlling union at Pacific Coast ports.

PMA and ILWU hoped their agreement would end a long history of labor discord along the Pacific Coast. Similar to the history of the proceeding now before the Commission, these labor problems had arisen from the impact on longshoremen's income and job security caused by the introduction of containerization in the Pacific trades. In return for ILWU's agreement to end its opposition to containerization (manifested by certain restrictive work practices), PMA agreed to create a "Mechanization and Modernization Fund" ("Mech Fund"), which was to be used to

mitigate the impact of longshore unemployment caused by containerization and related technological advances. In what turned out to be a significant development, the collective bargaining agreement specifically reserved to PMA alone the right to determine how to raise the Mech Fund from its members, at the rate of some $5,000,000 a year.

The complex Mech Fund formula eventually adopted by PMA was based on a variety of assessments against different types of cargo. Under the formula, Volkswagen's automobiles were being assessed at a rate 10 times higher than other cargo, even though automobiles had relatively less to gain from the PMA-ILWU agreement because the handling of automobiles already was highly mechanized. After failing to persuade PMA to adjust the formula, Volkswagen refused to pay any additional charges resulting from the PMA levy. When PMA initiated local court proceedings, Volkswagen obtained a stay in order to invoke the FMC's primary jurisdiction. Volkswagen then filed a complaint before the Commission, raising the following issues:

> 1. Whether the assessments claimed from Volkswagen were being claimed pursuant to an agreement or understanding among the PMA members that was subject to the requirements of section 15 of the 1916 Act, i.e., that the agreement should have been filed with and approved by the Commission before it was

implemented by PMA;[11]

2. Whether the assessments claimed from Volkswagen resulted in subjecting its automobile cargoes to undue or unreasonable prejudice or disadvantage in violation of section 16 of the 1916

---

[11] Section 15 provided in relevant part that:

> Every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy . . . of every agreement with another such carrier or other person . . . fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement.
>
> * * *
>
> The Commission shall . . . disapprove, cancel or modify any agreement . . . that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements . . . .
>
> * * *
>
> Any agreement . . . not approved, or disapproved, by the Commission shall be unlawful, and agreements . . . shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement . . . .

46 U.S.C. § 814 (1982).

Act;[12] and

3. Whether the assessments claimed from Volkswagen constituted an unjust or unreasonable practice in violation of section 17 of the 1916 Act.[13]

In October, 1965, the Commission, by a 3-2 vote, held that the Mech Fund agreement among the PMA members did not constitute an agreement subject to section 15.[14] The primary basis for the Commission's decision was its conclusion that section 15 was meant to apply only to those agreements affecting competition among their parties; the Commission further found that section 15, so interpreted,

---

[12] Section 16 provided in relevant part:

> That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly:
>
> First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description or traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . . .

46 U.S.C. § 815 (1982).

[13] Section 17 provided in relevant part that common carriers in foreign commerce

> and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property.

46 U.S.C. § 816 (1982).

[14] Volkswagenwerk Aktiengesellschaft v. Marine Terminals Corporation, 9 F.M.C. 77 (1965).

did not apply to the Mech Fund agreement because there was no showing that the costs of the Mech Fund assessments were being passed on to shippers. The Commission also held that no violations of section 16 or section 17 had been established. In December, 1966, the U.S. Court of Appeals for the District of Columbia Circuit unanimously affirmed the Commission's order in all respects.[15]

In March, 1968, the Supreme Court reversed. With respect to section 15, the Court held that the Commission's limitation of the statute's application to agreements affecting competition was not consistent with its broad language or legislative history, and that the Mech Fund agreement fit within the literal terms of section 15 and thus should have been filed with the Commission for approval before going into effect. Volkswagen, 390 U.S. at 273-77. It is noteworthy that the Court's majority perceived a clear distinction between, on the one hand, the Mech Fund agreement among the PMA members and, on the other hand, both the underlying collective bargaining agreement between PMA and the ILWU and the agreement creating PMA itself:

> It is to be emphasized that the only agreement involved in this case is the one among members of the Association allocating the impact of the Mech Fund levy. We are not concerned here with the agreement creating the Association or with the collective bargaining agreement between the Association and ILWU. No claim has been made in this case that either of those agreements was subject to the filing requirements of § 15. Those

---

[15] Volkswagenwerk Aktiengesellschaft v. FMC, 371 F.2d 747 (D.C. Cir. 1966) (per curiam).

> agreements, reflecting the national labor policy of free collective bargaining by representatives of the parties' own unfettered choice, fall in an area of concern to the National Labor Relations Board, and nothing we have said in this opinion is to be understood as questioning their continuing validity. But in negotiating with the ILWU, the Association insisted that its members were to have the exclusive right to determine how the Mech Fund was to be assessed, and a clause to that effect was included in the collective bargaining agreement. That assessment arrangement, affecting only relationships among Association members and their customers, is all that is before us in this case.

Id. at 278.

With respect to sections 16 and 17, although the Court did not reach the merits of those issues, it noted that if the Mech Fund agreement was subsequently filed with the Commission under section 15, the agency would be called upon again to consider the effect of sections 16 and 17, because an agreement that violated a specific provision of the 1916 Act was required to be disapproved. Accordingly, the Court felt that it was appropriate to comment upon the Commission's treatment of those issues.[16]

The Court indicated that, contrary to the Commission's holding, a violation of section 16 could be found even in the absence of a competitive relationship between the preferred individual and the prejudiced individual, particularly where ocean freight rates are not involved. 390 U.S. at 279-80. With respect to section 17, the Court criticized the Commission's interpretation of that statute

---

[16] Justice Fortas did not join in this part of the Court's opinion. 390 U.S. at 295.

as "far too narrow." Id. at 281. It noted previous Commission decisions holding that the question of reasonableness under section 17 does not depend upon discriminatory intent. The Court then stated that assessment agreements such as the Mech Fund should be judged under section 17 according to whether the charge assessed against a particular cargo is reasonably related to the services rendered to that cargo. Id. at 282.

Justice Douglas issued a lengthy dissent. He argued that the Court's decision would disrupt the collective bargaining process, by requiring FMC approval under section 15 of labor-related maritime agreements before such agreements could be implemented. Unlike the Court majority, he saw no practical way to separate an underlying collective bargaining agreement from a subsequent agreement among employers, such as the PMA Mech Fund, to meet their side of their bargain with their employees. 390 U.S. at 309-11. He therefore contended that both types of agreements should be exempted from section 15. It is clear that Justice Douglas's differences with the majority stemmed only from his concern with the "advance approval" requirements of section 15, and not from the prospect that the normative provisions of the 1916 Act, including sections 16 and 17, might be applied to a labor-related agreement after it had been implemented:

> To be sure, the parties to a collective bargaining pact must frame their agreement to fit within the standards of the antitrust laws or any other governing statutes. But without a requirement of

> advance approval of the terms of the agreement, they remain free to bargain speedily. Frustration of the collective bargaining process comes not so much from the possibility that one or more provisions in a collective bargaining pact might be found illegal at some future date under the antitrust laws, or other statutes such as §§ 16 and 17 of the Shipping Act, but rather from the undue and possibly lengthy freezing or stultification of solutions to troublesome labor problems while an intimate part of the proposed agreement is sent to the FMC for approval.

Id. at 312.

* * *

> If the present practice is an abuse, there is an existing remedy. . . . [Sections] 16 and 17 of the Shipping Act afford protection to foreign commerce in cases of undue discrimination or unreasonable practices affecting that commerce. While I cannot say that the Commission erred in finding no violation of § 16, I concur in a remand to the Commission for further findings under § 17. If the finding is for petitioner, there may be an incidental and after-the-fact effect on the provisions of the collective bargaining agreement. But it will not produce the paralyzing effect which will follow when prior approval is required. The application of §§ 16 and 17 in particular instances can indeed realistically be compared with enforcement of federal antitrust laws directed against specific practices.

Id. at 313-16 (footnotes omitted).

In a separate concurring opinion, Justice Harlan took issue with both the majority and Justice Douglas. He noted that:

> Multi-employer collective bargaining must . . . be reconciled with the sometimes competing policies of federal laws promoting and regulating competition, viz., the antitrust laws and, in the case of maritime labor relations, the Shipping Act. This is a problem on which Congress has provided relatively little direct guidance, but it is one of a kind that the Court has repeatedly grappled with . . . . It is a problem of line-drawing.

390 U.S. at 284. With respect to the accommodation advocated by Justice Douglas, Justice Harlan argued that the impact on collective bargaining from post-implementation attacks under sections 16 and 17 could be just as great as that caused by the section 15 pre-implementation approval process. Id. at 285. However, he also thought that by assuming a clear distinction between actual collective bargaining agreements and related Mech Fund-type agreements, the Court majority had failed to address some significant problems:

> The real difficulty in this case is . . . to define the Commission's jurisdiction in such a way that (whether challenges arise before or after implementation) the Commission will not improperly be brought into labor matters where it does not belong. The Court's only suggestion is that the labor agreements involved in this case "fall in an area of concern to the National Labor Relations Board." [Citation omitted].
>
> More circumspect analysis than this is needed, I believe. In the first place, since the later validity and antitrust immunity of all agreements subject to § 15 depend upon filing, it is desirable that signatories to agreements be given more precise instructions than that they need not file if they are in an area of Labor Board "concern." Furthermore, I see no warrant for assuming, in advance, that a maritime agreement must always fall neatly into either the Labor Board or Maritime Commission domain; a single contract might well raise issues of concern to both.

Id. at 286.

Justice Harlan suggested that collective bargaining agreements between maritime employers and their employees should have some exemption or immunity from both the filing requirements of section 15 and the substantive prohibitions

of sections 16 and 17. He acknowledged that the PMA Mech Fund agreement was not a collective bargaining agreement and therefore was not immune or exempt from any part of the Shipping Act. Nevertheless, he maintained that FMC review of the Mech Fund agreement under the 1916 Act still "must be circumscribed by the existence of labor problems that [the Commission] is not equipped to resolve." 390 U.S. at 287.

Justice Harlan then proceeded to state his view of the correct demarcation between areas properly subject to FMC regulation and areas properly left to labor regulation. Pointing out that whenever a multi-employer bargaining unit agrees to provide benefits for employees, a question arises as to how to allocate the costs of such benefits among the various employer members of the unit and, ultimately, the employers' customers, Justice Harlan saw the proper concern of the ILWU as being that this question should "receive some answer, but [the union] had no proper interest in which of the possible cost allocation plans was adopted, so long as any such plan raised the amount promised." Id. at 290 (emphases in original). He viewed the Commission's 1916 Act obligation as that of reviewing the fairness to the employer's customers, i.e., shippers, of the employer agreement allocating the cost burden of the collective bargaining agreement, and stated that this role for the Commission "does not mean Commission review of a labor agreement and does not imply consequences in conflict with national labor policy." Id. He cautioned, however, that:

> [N]o one has suggested that Maritime Commission review of a particular method of cost allocation may properly reach the question whether the obligation necessitating the allocation should have been entered into . . . . When the Court notes that only the assessment agreement must be filed and examined, it seems clear that it contemplates a Commission examination starting from the premise that the obligation to collect the Mech Fund will be fulfilled; at issue will be only the propriety of the choice of the route to that objective.

Id. at 290-91 (footnote omitted).

Finally, Justice Harlan offered his own analysis of the sections 16 and 17 issues. With respect to section 16, he agreed with the Court majority that the analysis should not turn on whether there was a competitive relationship between the person or cargo allegedly preferred and that allegedly prejudiced:

> In the present case, the problem before PMA was the allocation of a pre-specified total cost among its various members and their customers. Since this was very much a case of first impression, the Commission would have done well to go back to the language of § 16, which proscribes any "undue or unreasonable preference or advantage to any . . . description of traffic in any respect whatsoever." Certainly, since a "modernization tax" on any one group of customers lowered, by an equivalent amount, the cost of modernization to others obligated to pay for it, an unfair allocation of the burden could properly be described as a "preference" between that "description of traffic" bearing a heavy burden and that "description of traffic" whose burden was correspondingly lightened.
>
> * * *
>
> The difficulty with the method of assessment adopted by PMA is that it was not uniform and general but made special provision for automobiles. The fact that all automobiles are treated alike should not have prevented the Commission from inquiring whether special treatment for this class of goods was necessary

> under the circumstances and, if so, whether the special rule adopted was the fairest that could be devised.

390 U.S. at 293-94. With respect to section 17, he advocated an approach quite similar to that of the Court majority (id. at 281-82; see also id. at 266, n. 8), i.e., that the assessments against a particular cargo or person should be "reasonably related" to (1) the specific benefits it receives from containerization or other relevant modernization practices; and, of lesser importance, (2) the general benefits it receives from a stable labor situation brought about by the underlying collective bargaining agreement. Id. at 294-95.

No further law on the status of labor-related activities under the Shipping Act was made in the Volkswagen litigation. The related proceedings following the Supreme Court's remand broke no new ground.[17]

As discussed below, Volkswagen's holding with regard to pre-implementation Commission approval of labor-related agreements was eventually overtaken by legislation. Nevertheless, aspects of Volkswagen still have important application to this proceeding.

1. The six-Justice majority opinion and Justice Douglas's dissent provide no support for the proposition that the Commission must take labor considerations into

---

[17] See Agreement No. T-2635-2 - Pacific Maritime Association Final Pay Guarantee Plan, 18 F.M.C. 13, 19-20, 36-37 (1974), remanded sub nom. Wolfburger Transport-Gesellschaft m.b.h. v. FMC, 562 F.2d 827 (D.C. Cir. 1977).

account in adjudicating issues under the substantive provisions of the Shipping Act. As stated above, Justice Douglas's concern for labor policy was based only on section 15 of the 1916 Act and specifically not on sections 16 and 17 of that statute.

2. The majority's analysis of section 16, i.e., the clear antipathy toward the notion that competitive relationships must be proved, and section 17, i.e., "reasonableness" is a broad term requiring flexible interpretation, appear to be applicable now to the Rules on Containers. The majority's comments are not tied specifically to Mech Fund-type assessment agreements.

3. Justice Harlan's concurring opinion is sometimes cited for the proposition that the Commission must weigh labor factors in adjudicating issues under the Shipping Acts. However, his specific analysis of the appropriate tests under sections 16 and 17 of the 1916 Act indicate that he required above all else that the costs of a maritime labor agreement should be distributed fairly among shippers and other persons doing business with the carrier employers, and that he believed that by enforcing this fairness requirement, the Commission would not be acting "in conflict with national labor policy." 390 U.S. at 290. It must also be noted that Justice Harlan's opinion was based in significant part on certain assumptions regarding the proper limits of a union's interest in how management goes about meeting its collective bargaining undertakings. In its

negotiations with the carriers regarding the Rules on Containers, particularly provisions such as the Dublin Supplement, the ILA asserted a much broader role than Justice Harlan appeared to contemplate.

4. Lastly, Justice Harlan warned that the Commission should not engage in questioning whether a collective bargaining agreement should have been entered into in the first place. As we discuss below, this concern eventually resulted in legislation aimed at removing the Commission from collective bargaining; however, some of the approaches advocated by the I.D. in this proceeding and by the parties on Exceptions to the I.D. would require the Commission to do precisely what Justice Harlan feared.

B. The Boston Shipping Association "Labor Exemption"

In the wake of Volkswagen, there was uncertainty as to the impact of the Supreme Court's decision on maritime collective bargaining agreements and on related activities and agreements among carriers and other persons. In August, 1972, the Commission issued United Stevedoring Corporation v. Boston Shipping Association, 16 F.M.C. 7 (1972) ("BSA"), in which the Commission announced that, in determining the extent to which it appropriately should exercise jurisdiction over such agreements and activities, the agency would apply a "labor exemption" test similar to that developed in antitrust law, by which collective bargaining agreements meeting certain requirements were immunized from antitrust attack.

The case before the Commission involved the applicability of section 15 of the 1916 Act to three agreements that presented some significant differences from the Mech Fund agreement in Volkswagen. One agreement was the incorporation agreement and by-laws of the Boston Shipping Association ("BSA"), an employer organization similar to PMA. There were also two agreements among the BSA members regarding the allocation of labor gangs among stevedores, one of which was incorporated in an actual collective bargaining agreement between BSA and the ILA. Thus, the separation emphasized by the Volkswagen majority between organic employer bargaining unit agreements and employer-employee collective bargaining agreements, on the one hand, and agreements among FMC-regulated employers on implementation of their collective bargaining obligations, on the other hand, had been breached, as Justice Douglas had predicted in his dissent. Nevertheless, without extensive discussion, the Commission held that the BSA organic agreement fell within section 15. With respect to the stevedore allocation agreement set forth in the collective bargaining agreement, the FMC further held that incorporation into a collective bargaining agreement did not provide a basis for removing an agreement otherwise covered by section 15 from the statute. 16 F.M.C. at 13-15.

The NLRB had participated in the proceeding before the Commission and had helped develop suggested guidelines regarding the creation of a "labor exemption" for 1916 Act

agreements. The Commission discussed the three leading Supreme Court decisions involving the accommodation of labor and antitrust policies.[18] Those cases essentially involved collective bargaining provisions that cast doubt on the legitimacy of the underlying bargaining process because they affected competition between the employers who were parties to the collective bargaining agreement, and other companies. The Commission stated:

> [F]rom these cases have evolved the various criteria for determining the labor exemption from the antitrust laws and which we herewith adopt for purposes of assisting us in determining the labor exemption from the shipping laws with this caveat. These criteria are by no means meant to be exclusive nor are they determinative in each and every case. Just as in the accommodation of the labor laws and the antitrust laws the courts have resolved each case on an ad hoc basis, so too will we. Each of the following criteria deserves consideration, but it is obvious that each element is not in and of itself controlling. They are rather guidelines or "rules of thumb" for each factual situation. These criteria are as follows:
>
> 1. The collective bargaining which gives rise to the activity in question must be in good faith. Other expressions used to characterize this element are "arms-length" or "eyeball to eyeball."
>
> 2. The matter is a mandatory subject of bargaining, e.g. wages, hours or working conditions. The matter must be a proper subject of union concern, i.e., it is intimately related or primarily and commonly associated with a bona fide labor purpose.

---

[18] Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO v. Jewel Tea Co., Inc., 381 U.S. 676 (1965); United Mine Workers v. Pennington, 381 U.S. 657 (1965); Allen Bradley Company v. Local Union No. 3, International Brotherhood of Electrical Workers, 325 U.S. 797 (1945).

> 3. The result of the collective bargaining does not impose terms on entities outside of the collective bargaining group.
>
> 4. The union is not acting at the behest of or in combination with nonlabor groups, i.e., there is no conspiracy with management.

16 F.M.C. at 12-13. The Commission then added:

> In the final analysis, the nature of the activity must be scrutinized to determine whether it is the type of activity which attempts to affect competition under the antitrust laws or the Shipping Act. The impact upon business which this activity has must then be examined to determine the extent of its possible effect upon competition, and whether any such effect is a direct and probable result of the activity or only remote. Ultimately, the relief requested or the sanction imposed by law must then be weighed against its effect upon the collective bargaining agreement.

16 F.M.C. at 13. By adopting an approach that focused on whether a particular agreement affected competition, the Commission reverted to a modified version of its position in Volkswagen: the greater the effect of a labor-related maritime agreement on competition, the less likely it became that the agreement appropriately could be granted a "labor exemption" from the pre-implementation approval process of section 15.

The Commission also stated that maritime collective bargaining agreements themselves should be given special consideration both for section 15 approval and for adjudications under sections 16 and 17:

> Since maritime employers are permitted to bargain as a group, and since they are required to bargain about certain subjects (the mandatory subjects of collective bargaining), the resulting agreements must have some exemption from the

> requirements of section 15. Further, each such agreement will be entitled to labor policy considerations on an ad hoc basis with respect to possible violations of sections 16 and 17 of the Shipping Act.

16 F.M.C. at 13.

Applying the "labor exemption" guidelines to the agreements before it, the Commission held that all three agreements should be granted an exemption from section 15. As to the articles of incorporation and the bylaws of BSA itself, the Commission held that no valid regulatory purpose would be served in requiring organic agreements of collective bargaining units to be filed, unless they provided for purposes other than collective bargaining. The Commission further found that the second agreement, assigning labor gangs to stevedores, involved only the hiring by employers of employees and should be exempt from section 15 jurisdiction because of the strong labor policy considerations present and the remote and minimal effects upon competition.

The third agreement under consideration was incorporated in the BSA-ILA collective bargaining agreement. It involved the rights of a stevedore to whom a labor gang was assigned to have "first call" rights to that gang, and to "recall" that gang from another stevedore even though the gang may not have completed work on the vessels from which it was recalled. The Commission found that although this agreement went beyond the mere hiring of employees and did, in fact, have some competitive effects and overtones, it

nonetheless was the product of bona fide arm's-length collective bargaining. The Commission also found that the subject matter of the agreement was apparently a mandatory subject of collective bargaining and no terms were imposed on entities outside the collective bargaining group. For these reasons, the Commission determined that this agreement also was entitled to a labor exemption from the filing and approval requirements of section 15.

The Commission also held that the record did not support the allegations of complainant United Stevedoring Corporation that BSA's practices regarding the allocation of labor gangs to stevedores, as reflected in the agreements under examination, had violated sections 16 or 17 of the 1916 Act. The Commission's brief discussion of these issues centered on United Stevedoring's failure to prove that it had been harmed competitively by BSA's practices, and contained no acknowledgement of or effort to distinguish the Supreme Court's statement in Volkswagen that section 16 does not necessarily require such a showing where ocean freight rates are not involved. 16 F.M.C. at 15-16. Although the Commission commented in passing that any prejudice suffered by United Stevedoring may have been justified by its refusal to meet certain conditions imposed by the collective bargaining agreement on the assignment of work gangs, id. at 16; see also id. at 22-26, the Commission did not weigh "labor considerations" in reaching its conclusions with respect to sections 16 and 17.

The Commission's holding that section 15's requirements applied to articles of incorporation of collective bargaining units made up of Shipping Act-regulated employers and to collective bargaining agreements themselves (or at least parts thereof) went beyond the literal confines of Volkswagen, but was consistent with the majority Court opinion. However, by adopting "labor exemption" criteria that called for, among other things, determinations of whether the collective bargaining had been in good faith and whether the matters bargained for were of proper concern to the union, the Commission placed itself squarely in a position that none of the opinions in Volkswagen appeared to contemplate, i.e., of making findings of fact and conclusions of law regarding the collective bargaining process itself. Criteria aside, the "labor exemption" was limited to exempting agreements from the filing requirements of section 15 of the 1916 Act; the Commission did not indicate that it contemplated using a similar rule to exempt agreements -- and activities by individual carriers -- from regulation under the entire 1916 Act, including sections 16 and 17.

C. The New York Shipping Association Decisions

One year after the BSA decision, the Commission applied its labor exemption test to deny an exemption for a Mech Fund-type assessment agreement between the New York Shipping Association (NYSA) and the ILA. New York Shipping

Association - NYSA-ILA Man-Hour/Tonnage Method of Assessment, 16 F.M.C. 381 (1973), aff'd sub nom. New York Shipping Association, Inc. v. FMC, 495 F.2d 1215 (2d Cir.), cert. denied, 419 U.S. 964 (1974).

Unlike Volkswagen, the union was a party to this assessment agreement, the ILA having agreed with NYSA that the assessment issue would be included in the collective bargaining process, with full ILA participation. The Commission had ordered NYSA and the ILA to show cause why their assessment formula, as set forth in a 1972 amendment to their collective bargaining agreement, was not subject to section 15 of the 1916 Act, and not in violation of sections 16 and 17 as well.

In discussing the applicability of section 15 to the assessment agreement, the Commission, in a shift of tone from its BSA decision, acknowledged the significance of the fact that the agreement was part of a collective bargaining agreement. Nevertheless, the Commission held that the assessment agreement was not entitled to an automatic labor exemption from the approval requirements of section 15. The Commission then applied its BSA labor exemption criteria and found that "[w]hat the ILA wants here is not some new agreement on fringe benefits as such, but a guarantee that fringe benefits already negotiated will in fact be timely paid." 16 F.M.C. at 392. Thus the ILA had asserted in this agreement a much broader interest than that described by Justice Harlan in Volkswagen as one appropriate for union

concern. After analyzing federal labor statutes and court decisions, the Commission held that the assessment formula did not result from negotiations concerning a mandatory subject of collective bargaining (the second BSA criterion). The Commission also found that the agreement did impose its terms on persons outside of the collective bargaining group (the third BSA criterion), because non-member carriers were required, as a condition precedent to receiving terminal services at the Port of New York, to sign an agreement levying assessments in accordance with the assessment formula.

Having made these findings, the Commission stated that it was unnecessary to determine whether the collective bargaining between NYSA and the ILA had been in good faith or whether the ILA had conspired with NYSA (the first and fourth BSA criteria). The FMC concluded that the assessment formula agreement should not be granted a labor exemption, and instituted a proceeding to determine whether the agreement should be approved pursuant to section 15. For the duration of the proceeding, the Commission granted interim approval to the assessment agreement, pending any adjustments that might be necessary at the conclusion of the investigation. 16 F.M.C. at 396.

The Commission declined to make any findings with regard to sections 16 and 17, and stated that the status of the NYSA-ILA assessment agreement under those statutes would be included in the new proceeding. As in BSA, the

Commission gave no indication that a labor exemption from section 16 or section 17 could be granted to the agreement.[19]

In April, 1974, the U.S. Court of Appeals for the Second Circuit affirmed the Commission's order.[20] The court attached no importance to the fact that, unlike Volkswagen, the ILA was a party to the assessment agreement:

---

[19] In a separate opinion, Commissioner Clarence Morse stated:

> I concur in the majority's conclusion that the lawfulness of the assessment formula under sections 16 and 17 of the Shipping Act, 1916, must be tested under a fresh record establishing the conditions and circumstances as applicable thereto. It is implicit in such a conclusion that the assessment formula is not a mandatory subject of labor-management bargaining, that labor-exempt status therefore does not automatically apply, and that whether we will or will not grant a labor exemption to the assessment formula turns on a resolution of a line-drawing problem as between the Shipping Act, 1916, and the National Labor Relations Act, which can be accomplished only after full exposure to the applicable facts.

16 F.M.C. at 398 (footnote omitted). Commissioner Morse apparently believed that the BSA "final analysis" would be performed only if a Shipping Act case under sections 16 and 17 had been made out against the assessment agreement, and that the "final analysis" then would determine whether labor considerations outweighed Shipping Act considerations. However, the Commission majority had already performed a "final analysis" as part of its conclusion that a labor exemption should not apply. 16 F.M.C. at 395. Thus the majority utilized labor considerations only to determine the question of section 15 jurisdiction, and not to the undecided issues of possible substantive violations of the 1916 Act.

[20] The Commission was supported before the court by the Department of Justice, and opposed by the Department of Labor and the NLRB. However, the court made no mention of the latter agencies' position in its discussion of the merits.

> To be sure, the FMC has no concern with so much of the agreement as provides what wages and other benefits shall be paid to the longshoremen, grievance procedures and similar matters. But even though we fully accept that the ILA has an important stake in the existence of a workable and reliable assessment formula, this does not relieve the FMC of its duty to determine whether the formula is reasonable in its effects on shipping. That inquiry is just as important as under the . . . agreement in Volkswagenwerk. Similarly, the fact that the union has here succeeded in forcing NYSA to bargain over the assessment formula does not by itself take the formula out of the reach of § 15. The union's achievement demonstrates its power to force this concession, but it does not dilute the magnitude of problems raised by the formula for shippers and carriers.

495 F.2d at 1220-21.

The court did not approve or disapprove the Commission's four specific labor exemption criteria. Instead, the court concluded that the assessment agreement would have a direct and substantial effect on competition among both carriers and shippers and for that reason raised Shipping Act problems that "clearly predominate over the labor interests raised by the assessment formula." 495 F.2d at 1221.

In dicta, the court also indicated its belief that the Commission should continue to weigh labor interests in its investigation of the sections 16 and 17 issues:

> Plainly, the labor interests in the agreement do not evaporate upon a finding of FMC jurisdiction; those interests demand the Commission's continuing attention throughout the process of investigating the status of the agreement under §§ 16 and 17. In determining whether to approve the agreement, the Commission must be particularly sensitive to aspects of the assessment scheme that have relatively more impact on the collective bargaining process and relatively less on competitive conditions in the industry. As the petitioners have repeatedly pointed out, the ILA's

> interest is primarily in assuring that the fringe benefit payments will be made; it has no proper concern over who makes the payments as long as they are forthcoming. The portion of the assessment formula allocating payment requirements, therefore, is farthest from the union's legitimate sphere of interest. The more vital portions of the agreement, so far as the union is concerned, are the provisions relating to the means by which the assessment obligations are to be collected. Correspondingly, the allocation formula would seem to be of primary concern to the FMC, while the enforcement mechanism would appear to have substantially less potential effect on competitive conditions. In determining whether the agreement should be approved, disapproved or modified, the Commission must thus continue to weigh the Shipping Act and labor interests raised by different portions of the agreement and should move with caution in areas of greater collective bargaining concern.

495 F.2d at 1222 (footnote omitted).

By emphasizing competition as a tool for accommodating labor interests under sections 16 and 17, the Court of Appeals appeared to depart from Volkswagen. Neither the majority nor the separate opinions in Volkswagen held that labor assessment formulas should be reviewed under the substantive provisions of the 1916 Act by determining whether they created competitive disadvantages for particular classes of carriers or shippers; on the contrary, both the majority and Justice Harlan indicated that an unjust preference or prejudice in violation of section 16 by an assessment agreement could be established without a showing that competitive relationships among shippers had been affected. Section 17 has never been interpreted by the Commission as requiring evidence of an impact on competition, and the Supreme Court's endorsement of a

flexible standard under that statute did not impose such a showing. Thus, the suggestion by the Court of Appeals that, in an adjudication under section 16 or section 17, the Commission should view Shipping Act interests as being coextensive with impact on competition and that the Commission should allow labor interests to predominate if the conduct in question does not affect "competitive conditions in the industry," 395 F.2d at 1222, gave the agency a different set of interpretive standards than those articulated six years earlier in Volkswagen.

There were no further substantive developments in the law in this case; the Commission investigation was eventually settled and discontinued without a subsequent decision on the merits.[21]

D. The PMA Litigation

In January, 1975, the Commission again denied a labor exemption to an agreement that was part of a collective bargaining contract. The collective bargaining parties here were PMA and the ILWU, the same parties as in Volkswagen. Pacific Maritime Association - Cooperative Working Arrangements, 18 F.M.C. 196 (1975), rev'd sub nom. Pacific Maritime Association v. FMC, 543 F.2d 395 (D.C. Cir. 1976), rev'd, 435 U.S. 40 (1978).

---

[21] Docket No. 73-34 - New York Shipping Association - Man-Hour/Tonnage Assessment Formula.

The agreement in issue was meant to correct difficulties resulting from differences in fringe benefit plans and certain labor practices between the PMA-ILWU collective bargaining agreement and the ILWU's agreements with ports not members of PMA. PMA and ILWU agreed that nonmember ports, as a condition of using the PMA-ILWU dispatching halls for jointly registered employees, would be required, among other things, to participate in all fringe benefit plans, pay the same dues and assessments as PMA members and be treated as a PMA member during strikes and work stoppages. At the request of several small nonmember ports, the Commission had begun an investigation in September, 1972, to determine whether this PMA-ILWU agreement was subject to section 15 of the 1916 Act and whether its implementation would result in practices violative of sections 16 and 17.

In the original order of investigation, the Commission included as an issue whether there were any labor policy considerations that should exempt the agreements and practices under investigation from any of the relevant sections of the 1916 Act, including sections 16 and 17. See 18 F.M.C. at 197. This was the first occasion on which the Commission indicated (albeit without comment or explanation) that the labor exemption criteria could apply to the substantive prohibitions of the 1916 Act, as well as to section 15. The BSA decision, issued one month earlier in August, 1972, had applied the labor exemption guidelines

only to section 15. Nor did the Commission subsequently apply the approach ordered here in other cases. In June, 1973, less than a year later, the Commission issued NYSA, which, in denying a labor exemption for section 15 purposes and ordering a further investigation under sections 16 and 17, gave no indication that the investigation should determine whether a labor exemption should be granted for sections 16 or 17.

The Commission had severed, for expeditious resolution, the issue of its section 15 jurisdiction over the PMA-ILWU agreement. The Commission found without difficulty that because the purpose of the agreement was to control competition between PMA ports and nonmember ports, the agreement was subject to section 15 unless it was entitled to a labor exemption.

In applying the four BSA labor exemption criteria, the Commission determined that the agreement was not concerned with mandatory subjects of collective bargaining as defined by the National Labor Relations Act and cases thereunder (the second BSA criterion), because the agreement had as its primary purpose the inclusion of nonmember ports into the PMA "camp," and any effect on ILWU wages or working conditions would be incidental. 18 F.M.C. at 203-204. The Commission then reviewed several provisions of the agreement and found that it did impose its terms on entities outside the collective bargaining group (the third BSA criterion), because the agreement's overall effect was to require

nonmember ports either to submit to its terms or to incur sanctions such as denial of participation in PMA hiring halls and fringe benefit funds, as well as use of ILWU labor. Id. at 206. In view of these findings, the Commission, as it did in NYSA, found it unnecessary to determine whether the PMA-ILWU bargaining had been in good faith or whether the ILWU had conspired with PMA (the first and fourth BSA criteria). Id. at 203, 208.

The Commission then performed its BSA "final analysis" and found that while the agreement had a potentially severe and adverse effect upon competition among ports, its importance to the collective bargaining process was minimal because "[w]ith or without the [agreement], the provisions for fringe benefits, which are the main concern of the ILWU, remain unchanged." 18 F.M.C. at 209. The Commission thus concluded that a labor exemption should be denied and issued an order directing an investigation of the agreement to determine whether it should be approved under the standards of section 15. Unlike NYSA, however, the Commission did not grant interim approval to the agreement. The Commission also directed that the investigation should determine whether implementation of the agreement would result in practices violative of sections 16 or 17, and whether "any labor policy considerations would operate to exempt these agreements or practices resulting therefrom from any

provision of sections 16 or 17 . . . ." Id. at 212-13.[22]

The Court of Appeals

In August, 1976, the U.S. Court of Appeals for the District of Columbia Circuit reversed the Commission's decision. The court held that labor-related agreements among Shipping Act-regulated employers (such as the Volkswagen Mech Fund) should be the outermost boundary of section 15 jurisdiction, and that underlying collective bargaining agreements negotiated between such employers and labor should, as a class, fall outside that jurisdiction. Thus the D.C. Circuit reached a contrary conclusion from that of the Second Circuit two years earlier in NYSA, which held that Commission jurisdiction over a labor-management agreement (at least one not qualified for a labor exemption) was a natural extension of Volkswagen.

---

[22] As he did in NYSA, Commissioner Clarence Morse dissented. Showing increasing uneasiness with the Commission's assertion of section 15 jurisdiction over labor-related agreements, Commissioner Morse would have granted a labor exemption here for section 15 purposes, because he believed that the impact of the agreement on the collective bargaining process outweighed any effect it might have on port competition. He stated:

> In my opinion, the majority ignore the reality of labor-management relations when they suggest that denial of labor exemption to the Revised Agreement "will have no effect upon PMA's obligations under the labor contract." This is another indication of our lack of expertise in this labor-management field.

18 F.M.C. at 210, n. 21. Nevertheless, Commissioner Morse did state that sections 16 and 17 could apply to practices resulting from the agreement.

Although the court said that it appreciated the difficulties the Commission faced in reconciling competing statutes and national policies, it held that the Commission's solution of applying the BSA labor exemption derived from antitrust law to collective bargaining agreements was not satisfactory, at least as far as section 15 was concerned, because of that statute's requirement of pre-implementation approval:

> Unlike the antitrust laws, section 15 prescribes a procedure whereby agreements subject to the Act must be filed with the Commission before implementation. The legislative scheme is a sound one for assuring that agreements among carriers which fix rates, pool earnings, allocate ports, or limit traffic must be approved or modified by the agency with an expertise in shipping matters. As the legislatively established regulator of maritime concerns, the Commission needs authority to postpone the effective date of such agreements pending full examination of their impact on the entire industry. The Federal Maritime Commission, however, is not in any way the congressional choice of regulator for labor relations within the shipping industry . . . . Subjecting negotiated labor agreements to filing and approval (or disapproval or modification) would place collective bargaining units in the shipping industry under more stringent federal regulation than other transportation industries and thus at a competitive disadvantage.

543 F.2d at 406 (emphasis in original). The court pointed out that collective bargaining required the ability of both sides to implement quickly compromise agreements worked out in eleventh-hour bargaining sessions or, as in this case, in hard-fought negotiations following a strike and mediation. The court noted that the agreement in question was illustrative of the problem because it had been negotiated

in 1972 and refined in 1973, but had not yet been put into effect. The ameliorant of interim approval, granted by the Commission in NYSA but not granted here, was viewed as inadequate by the court. Id. at 407.

The court revived the distinction noted by the Volkswagen majority between agreements among Shipping Act-regulated employers related to underlying employer-employee collective bargaining agreements, and the collective bargaining agreements themselves. This distinction had been essentially ignored by the Commission in BSA, and then acknowledged but held to be not determinative in NYSA. The D.C. Circuit here used that distinction to create a judicial barrier, which it acknowledged could be described as arbitrary, 543 F.2d at 409, against FMC jurisdiction over employer-employee agreements. With regard to Justice Harlan's concurring opinion in Volkswagen, which had provided the foundation for the BSA and NYSA results, the court stated:

> Even if we were to adopt the balancing test suggested by Justice Harlan, the agreement at issue would be exempt from filing. The agreement challenged in Volkswagenwerk assessed fees to employers on the basis of tonnage handled, tonnage being determined by weight or measurement depending upon the manifesting custom for each type of cargo. Almost all the employers passed these costs on to their customers, thus causing the assessment to fall disproportionately on shippers who transported automobiles by nonmember charter and common carriers. In this way, the agreement produced discriminatory tariffs--a primary concern of the Act--for the shipping of automobiles.
>
> In contrast, [this agreement] is challenged not because it will compel discriminatory rates, but

> because it will allegedly force nonmembers into accepting the same wage, fringe benefit and work stoppage terms as those negotiated by the multi-employer unit . . . . FMC has thus accepted jurisdiction to determine shipping implications of an agreement which perhaps imposes an improper bargaining unit. We do not believe that the Shipping Act pre-implementation approval provision was intended to cover problems so clearly within the realm of National Labor Relations Board expertise.

Id. at 409-10 (emphasis supplied) (footnotes omitted).

At the close of its opinion, the court cautioned that in holding that the Commission did not have section 15 jurisdiction over these agreements, it was not insulating the agreements from FMC scrutiny under the rest of the 1916 Act:

> Despite the inappropriateness of section 15 procedures for collective bargaining agreements, shipping concerns are clearly evident in the possibility that the actual implementation of the agreement will result in discriminatory practices or rates against the complaining ports. The concept of section 15 jurisdictional prerequisites different from those of sections 16 and 17 is not novel. The Act itself provides for FMC consideration of individually-imposed discriminatory rates and practices as well as approval of inter-carrier agreements.

543 F.2d at 410 (emphasis in original). Like the Second Circuit's decision in NYSA, the court then stated that labor considerations should continue to apply to Commission examination of allegedly discriminatory or unreasonable practices. However, unlike the Second Circuit's suggestion that the Commission should weigh labor and shipping concerns based on relative impact on competition, the D.C. Circuit thought that this was an appropriate area for application of the BSA labor exemption:

> FMC jurisdiction under sections 16 and 17 must still accommodate labor concerns and the exemption borrowed from antitrust law would appear to be the proper limit on that jurisdiction. Unlike the prior approval strictures of section 15, sections 16 and 17 impose penalties after-the-fact and do not interrupt industrial peace by forbidding or postponing implementation of collective bargaining terms. Like the antitrust laws, they protect the shipping industry from predatory rates and practices and are thus suitable tools for controlling Shipping Act violations which result from labor-management conspiracies.

Id. at 411. As noted, in its order directing a continued investigation of the agreements, the Commission also had raised an issue whether a labor exemption should be applied to the sections 16 and 17 issues.

The Supreme Court

In March, 1978, the Supreme Court, by a 5-3 vote,[23] reversed the D.C. Circuit and reinstated the result reached by the Commission. The Court stated that it had granted the petition for certiorari filed by the Commission and the Department of Justice in order to resolve two issues: whether national labor policy required exempting all collective bargaining agreements as a class from the filing requirements of section 15 (which had been the conclusion of the D.C. Circuit) and, if not, whether the PMA-ILWU agreement nevertheless should be exempt from those requirements.

The Court first stated that it could not agree with the D.C. Circuit that, whatever their effects on competition

---

[23] Justice Blackmun did not participate.

might be, collective bargaining contracts were categorically exempt from section 15. The Court agreed that prompt implementation of "lawful" collective bargaining agreements is an important consideration, 435 U.S. at 57, but it stated that the D.C. Circuit's fears about the impact of section 15 on such implementation were exaggerated because (1) agreements between a union and a single employer would not be subject to section 15 filing; and (2) only those agreements between a union and multiemployer bargaining units that operated to the detriment of commerce or otherwise failed to meet the standards of section 15 could be disapproved by the Commission, and this would exclude most ordinary collective bargaining agreements. The Court also noted the availability of conditional approvals by the Commission, and rejected the D.C. Circuit's argument that conditional approval was an inadequate solution.

Regarding the Commission's refusal to grant a BSA labor exemption to the PMA-ILWU agreement, the Court stated that "the Commission found all it needed to find to assume jurisdiction and proceed with the case under section 15 when it concluded that PMA and the Union had undertaken to impose employment terms and conditions on employers outside the bargaining unit." 435 U.S. at 62. The Court otherwise endorsed the Commission's construction and employment of the BSA labor exemption, and rejected suggestions that the Commission lacked the experience or ability to deal with labor-related agreements.

The majority opinion made no mention of the applicability of sections 16 and 17 to the PMA-ILWU agreement. However, Justice Powell, writing for the three dissenters, stated:

> A proper accommodation of the conflicting signals of the Shipping Act and federal labor policy requires that bona fide collective-bargaining agreements, arrived at through arms-length negotiations, do not fall within section 15. As in other collective bargaining contexts, labor and management in the maritime industry would be free to reach agreement without prior Government approval or control over the substantive terms of the bargain, while the agreement itself or its implementation would be subject to scrutiny under the antitrust laws and the specific prohibitions of §§ 16 and 17 of the Act.

435 U.S. at 68 (footnotes omitted). See also id. at 77. Thus, Justice Powell's dissent essentially tracks the argument first made by Justice Douglas ten years earlier in his dissent in Volkswagen: that the national policy in favor of unfettered collective bargaining should remove maritime collective bargaining agreements (and, presumably, related Mech Fund-type agreements) from section 15's requirement that such agreements must be approved before they can be implemented, and that the shipping public can be protected adequately by the application of the substantive prohibitions of the 1916 Act against discriminatory and unreasonable practices to such agreements once they have gone into effect.

The Supreme Court's decision reinstated the Commission's order instituting an investigation to determine whether the PMA-ILWU agreement should be approved under

section 15, and had no effect on the Commission's additional directive that the investigation also should determine whether implementation of the agreement would violate sections 16 and 17 and whether "labor policy considerations" should "exempt" the agreements from those sections. Three weeks after the Supreme Court's decision, PMA and the ILWU withdrew from their agreement, thus removing the necessity for any further Commission proceedings.[24] Nevertheless, some comment on the references by the Commission and the D.C. Circuit Court of Appeals to the application of labor considerations is appropriate.

There is no apparent explanation for the Commission's reference in the original order of investigation in September, 1972, to a possible labor exemption from sections 16 and 17. As noted, that reference had no antecedent in the month-old BSA decision and was not repeated the following year in NYSA. The renewal of that issue in the January 1975 order structuring further proceedings on the PMA-ILWU agreement is even more perplexing, because by that time the Commission had already determined that a BSA labor exemption should not be granted to that agreement for purposes of section 15. Since the Second Circuit's decision in NYSA had been issued the previous year, it is possible that the 1975 order's reference to an exemption meant

---

[24] Docket No. 72-48, Pacific Maritime Association - Cooperative Working Arrangements, Order Dismissing Application and Discontinuing Proceeding, 18 S.R.R. 523 (ALJ), administratively final June 22, 1978.

instead to direct that evidence as to "labor policy considerations" should be developed and weighed in any adjudication under section 16 or section 17, as the Second Circuit had suggested.

In any event, there is a fundamental difference between the approach espoused by the Second Circuit in NYSA and that apparently visualized by the D.C. Circuit two years later in PMA. As noted, the Second Circuit had suggested that labor interests should continue to be relevant throughout a Commission investigation under sections 16 and 17. In contrast, the D.C. Circuit would have had the Commission apply labor considerations in a BSA exercise in order to determine threshold jurisdiction under sections 16 and 17, but the court did not cite NYSA or otherwise indicate that the Commission should continue to weigh labor concerns after jurisdiction had been asserted. The discussions by both courts on this point are technically dicta, but it would have been irresponsible for the Commission, as a subordinate agency, to ignore advisory interpretations by a circuit court. Nevertheless, it is clear that, at this point in time, the issue of the place of "labor considerations" in Shipping Act adjudications remained confused and unsettled. Certainly, the Commission had not articulated a coherent and consistent approach of its own.

E. The Commission's 1978 "Sea-Land" Decision on the Rules on Containers

On June 14, 1978, three months after the Supreme Court's decision in PMA, the Commission issued its decision concerning the application of the Rules on Containers to the domestic offshore trade between the U.S. East and Gulf Coasts and Puerto Rico. Sea-Land Service, Inc. and Gulf Puerto Rico Lines, Inc. - Proposed Rules on Containers, 21 F.M.C. 1 (1978) ("Sea-Land"), aff'd in part and remanded in part sub nom. Council of North Atlantic Shipping Associations v. FMC, 672 F.2d 171 (D.C. Cir.), cert. denied, 459 U.S. 830 (1982), report and order on remand, FMC Nos. 73-17 and 74-40, 21 Pike & Fischer Shipping Regulation Reports (S.R.R.) 852 (May 19, 1982), vacated and remanded, unofficially reported at 21 S.R.R. 1057 (D.C. Cir. July 2, 1982), reh. en banc denied, No. 78-1776 (D.C. Cir. Sept. 23, 1982). As the foregoing citation indicates, this proceeding had a long and tangled history. We shall summarize the Commission's decision here. However, in the belief that close adherence to chronology is the most helpful method of discussion, we have postponed discussion of the subsequent appellate proceedings to subpart I, infra, after analysis of two important intervening events, the Supreme Court's decision in NLRB v. International Longshoremen's Association, 447 U.S. 490 (1980), and the passage into law of the Maritime Labor Agreements Act, and a summary of the institution of this proceeding.

On March 15, 1973, two ocean common carriers, Sea-Land Service, Inc. ("Sea-Land"), and Gulf Puerto Rico Lines, Inc. ("GPRL"), filed proposed amendments to their tariffs applicable between East and Gulf Coast ports and Puerto Rico, which set forth the Rules on Containers in the form required by the collective bargaining agreements then in effect between the carriers and the ILA (the "Dublin Supplement" had just been negotiated). As previously noted, the Puerto Rican trade was the first in which the container method of ocean transportation was used extensively, and the consolidation of less-than-containerload shipments into containerloads was prominent in this trade. These two factors apparently prompted the ILA to focus its efforts in the early 1970's to enforce the Rules on the Puerto Rican trade.

The tariff amendments filed by Sea-Land and GPRL were scheduled to become effective on April 14, 1973. However, on April 13, the Commission, acting pursuant to its authority under the Intercoastal Act, 46 U.S.C. § 843 et seq. (1982), suspended the tariffs through August 13, 1973, and instituted an investigation (Docket No. 73-17, Sea-Land Service, Inc. and Gulf Puerto Rico Lines, Inc. - Proposed Rules on Containers) to determine whether implementation of the Rules as set forth in the tariffs would violate sections 14 Fourth, 16 First or 18(a) of the 1916 Act, or section 4

of the Intercoastal Act.[25]

During the period between April, 1973, and August, 1974, Sea-Land and GPRL withdrew from the Puerto Rican trades and were replaced by the Puerto Rico Maritime Shipping Authority ("PRMSA"). On August 2, 1974, PRMSA filed with the Commission a tariff scheduled to be effective on September 16, 1984, when PRMSA planned to commence operations as a common carrier in the Puerto Rican trades. Portions of that tariff set forth Rules on Containers provisions identical to those already under investigation. On September 13, the Commission placed PRMSA's proposed tariff under investigation (Docket No. 74-40, Puerto Rico Maritime Shipping Authority - Proposed ILA Rules on Containers) and consolidated the new investigation with Docket No. 73-17. The Commission also suspended PRMSA's tariff until January 15, 1975. This suspension subsequently was vacated by the Commission on September 23, 1974, but actual implementation of PRMSA's Rules on Containers tariff at ports along the East Coast was sporadic and inconsistent, in part because of injunctions obtained by the NLRB.

---

[25] Section 14 Fourth of the 1916 Act forbade ocean common carriers from unfairly treating or unjustly discriminating against any shipper "in the matter of . . . cargo space accommodations or other facilities . . . ." 46 U.S.C. § 812 (1982). Section 18(a) of the 1916 Act and section 4 of the Intercoastal Act required ocean carriers in the domestic offshore trades to establish and observe just and reasonable tariffs and practices. 46 U.S.C. §§ 817(a), 845a (1982). See n. 12, supra, regarding section 16 First of the 1916 Act.

The Commission's 1978 decision adopted in all important aspects an initial decision issued on October 9, 1975, by an administrative law judge ("ALJ").[26] The ALJ rejected the contention advanced by CONASA[27] that the Commission lacked jurisdiction over the Rules as reflected in PRMSA's tariff because of their origin in a collective bargaining agreement. He stated that it is a "fundamental truth" that "the FMC has jurisdiction over tariffs (rules, rates, etc.) of ocean common carriers in the United States mainland/

---

[26] The delay between the initial decision and the Commission's decision was caused by intervening litigation against the Rules on Containers under the federal labor laws. In 1975, the NLRB held that the Rules violated the National Labor Relations Act and ordered that implementation of the Rules in the Port of New York must cease. The NLRB's decision was upheld on appeal. International Longshoremen's Association (Consolidated Express, Inc.), 221 N.L.R.B. 956 (1975), enforced sub nom. International Longshoremen's Association v. NLRB, 537 F.2d 706 (2d Cir. 1976), cert. denied, 429 U.S. 1041 (1977), vacated and remanded, No. 75-4266 (2d Cir. Oct. 1, 1980). After the NLRB decision, PRMSA had filed a tariff note indicating that its Rules on Containers provisions would not be enforced pending review of the NLRB's decision. In light of this tariff note and the subsequent court decision upholding the NLRB, the Commission discontinued Dockets Nos. 73-17 and 74-40 on August 10, 1977. 20 F.M.C. 120. However, various persons opposed to the Rules filed petitions asking the Commission to reconsider its action. On the basis of these petitions, the Commission vacated its order of discontinuance and determined to issue a decision on the merits of the proceeding. 20 F.M.C. 788; 21 F.M.C. at 2-3.

[27] CONASA was formed in 1971 and acted as a multi-employer bargaining representative in negotiating master contracts with the ILA for East Coast ports, including New York and Baltimore. In 1977, NYSA withdrew from CONASA and subsequently has represented itself in negotiations with the ILA. The Boston Shipping Association also withdrew from CONASA in 1982. During the proceedings before the ALJ, CONASA, rather than PRMSA, took the lead in defending the Rules. The ILA was not a party to the proceedings.

Puerto Rico trade." 21 F.M.C. at 29. He further found that PRMSA's tariffs should not be granted a BSA labor exemption from application of the 1916 Act and the Intercoastal Act. However, the ALJ did not make any findings under the BSA criteria, but instead held simply that the tariffs constituted

> a shipping matter subject to shipping laws, and separate from any labor matter and the labor laws. However, if one were to conclude that PRMSA's rules on containers are partly a shipping matter and partly a labor matter, one still must conclude that the shipping part is of such importance that it is not immunized from the shipping laws.

Id. at 33.

The ALJ also found that the Rules violated the common carrier obligations imposed upon PRMSA by the 1916 Act and the Intercoastal Act. The ALJ relied both on the facially discriminatory provisions of the Rules themselves and on evidence of actual effects of the Rules on specific business enterprises. Testimony as to the Rules' effects was largely limited to the Port of New York; as noted above, actual implementation of PRMSA's tariff along the East and Gulf Coasts was erratic and inconsistent. 21 F.M.C. at 16. The ALJ discussed this evidence, id. at 24-25, but he focused more on types of discriminations imposed by the text of the Rules. For example, he noted that an export shipper within the 50-mile zone who loaded a full container at its own facility obtained more favorable treatment than either a shipper whose full container was loaded at a public warehouse or a shipper whose goods formed part of a

consolidated containerload. Imported containers whose destinations were within the 50-mile zone were subject to ILA stripping, or 30 days warehouse storage, unless the owner unloaded the goods at its own warehouse facilities. None of these differences, the ALJ found, were justified by any difference in the value of the transportation services provided by PRMSA, which in each case simply transported a sealed container aboard its vessel. Id. at 25-28. Apart from the broad discriminations among categories of shippers, the ALJ found that the Rules imposed additional delays and expenses upon shippers, that some of the Rules' provisions were ambiguous, and that these factors were additional reasons why the Rules were unjust and unreasonable. Id. at 29.

The ALJ's ultimate conclusions as to the lawfulness of PRMSA's tariffs essentially excluded labor considerations:

> [A]ll shippers should be treated substantially equally, provided of course that they seek and receive the same ocean transportation service from the same ocean carrier . . . . [I]f the tariff rules provide for grossly unequal treatment of similarly situated shippers the rules are clearly unlawful under the Shipping Acts . . . . [U]nlawful tariff rule discrimination is unlawful tariff rule discrimination, regardless of the fact that it may have been caused by a work preservation rule, and it matters not at all whether the work preservation rule is lawful in and of itself. It is elemental and basic to United States transportation law, that shippers all be treated equally, whether large or small, or whether they differ in their plants, warehouse facilities or in other respects, provided only that they are buying identical transportation services.

21 F.M.C. at 29. However, the ALJ had ruled that evidence offered by CONASA regarding labor considerations was

relevant because the Commission was obliged to consider the public interest in maintaining ocean commerce free from labor unrest. Id. at 22. Accordingly, he applied labor considerations in fashioning the remedy for PRMSA's violations. He stated that the Commission "should recognize that any order it may issue should be carefully drawn so as not to precipitate any actions which may interfere with the steady flow of ocean commerce in the Puerto Rican trade." Id. at 35. For that reason, he gave PRMSA three months to devise and put into effect a revised tariff that would be in compliance with the 1916 Act and the Intercoastal Act.

CONASA and PRMSA filed exceptions to the initial decision. They contended that the ALJ had erred in finding violations based on what CONASA characterized as a "per se violation" concept. CONASA argued that to constitute a violation, the dissimilarity of treatment of similarly-situated shippers under the Rules must be undue or unjust - i.e., not justified by transportation factors. CONASA contended that ILA longshore services and the collective bargaining agreement that governed the provision of such services to shippers are transportation factors, which accordingly must be considered and which justified the differing treatments of certain shippers.

In rejecting CONASA's arguments and adopting the initial decision, the Commission stated:

> CONASA would have us accept the proposition that the factors which created the uneven treatment also sufficiently justify such treatment. We find this argument ingenious but unconvincing.

> We are of the opinion that the rules published in PRMSA's tariff were properly found by the Presiding Officer to create an anomalous condition where shippers who are similarly situated in all other transportation respects, are treated decidedly differently. Further, we agree with the Presiding Officer that the existence or not of a collective bargaining agreement which affects but is not a part of the transportation aspects of a shipper's relationship with his carrier, need not be given overwhelming priority or weight as a transportation factor by which to justify dissimilarity of treatment. We may agree that such an agreement is a factor to be considered. However, there are other factors. The mere existence of the collective bargaining agreement does not pre-empt those other factors or foreclose our consideration of them. For us to adopt the contentions of respondents would be tantamount to an acknowledgement by us that a common carrier by water or other person subject to our jurisdiction could escape our jurisdiction by the simple device of voluntarily (albeit with pressure from a union) entering into an agreement which obligates the common carrier to take actions which may be or are in clear violation of the Shipping Act. We do not view the impact of the National Labor Relations Act as permitting a common carrier to disregard entirely its statutory obligations when conducting and resolving labor/management negotiations. We find that upon consideration of the transportation factors in the situation created by these rules, including the underlying ILA-CONASA agreement, the disparity of treatment under the rules is not adequately justified.
>
> This is not an adoption of a "per se violation" concept. It is, rather, a simple acknowledgement by us that the record in this proceeding shows adoption and implementation of tariff rules which are unjust and unreasonable, and which are unduly and unreasonably prejudicial and disadvantageous because their effects are unjustified by transportation factors.

21 F.M.C. at 4 (emphases in original) (footnote omitted). The Commission also rejected arguments that it lacked jurisdiction over PRMSA's tariff rules. These arguments did not focus on a BSA labor exemption but rather on Justice

Harlan's concurring opinion in Volkswagen. The Commission concluded that Justice Harlan's opinion did not support exempting PRMSA's tariffs from regulatory jurisdiction, on the ground that while Volkswagen involved the issue of advance approval under section 15, with the resulting delay in implementation of a collective bargaining agreement, this case involved "merely the unilateral implementation of a rule founded in a collective bargaining agreement." Id. at 6.

Although the Commission adopted the initial decision in Dockets Nos. 73-17 and 74-40, its analysis differed in some significant aspects. These differences were critically noted by the Presiding Officer in his Initial Decision in this proceeding (I.D. at 36-37). Because the arguments advanced by CONASA to the Commission in Sea-Land regarding the proper treatment of the collective bargaining agreement are identical in many ways to the arguments now being made by the carriers and the ILA in defense of the I.D., the Presiding Officer's comments regarding Sea-Land are important.

It does appear, as the I.D. states, that the Commission's discussion quoted above contained an internal inconsistency. The Commission came very close to saying that a collective bargaining agreement cannot justify dissimilar treatment of shippers ("CONASA would have us accept the proposition that the factors which created the uneven treatment also sufficiently justify such treatment").

21 F.M.C. at 4. However, the Commission went on to state that a collective bargaining agreement was a "transportation factor" after all, which should be weighed in the analysis, but that here, "upon consideration of the transportation factors in the situation created by these rules, including the underlying ILA-CONASA agreement, the disparity of treatment under the rules is not adequately justified." Id. Thus, the status of collective bargaining agreements in Shipping Act adjudications unfortunately was left somewhat ambiguous. Moreover, the Commission's decision failed to identify or explain (1) the other transportation factors the Commission considered; (2) its method of weighing those other factors against the collective bargaining agreement; or (3) how the Commission reached its conclusion that the other factors outweighed the collective bargaining agreement. Finally, contrary to the Commission's characterization of his analysis, the ALJ did not state or conclude that a collective bargaining agreement "need not be given overwhelming priority or weight as a transportation factor by which to justify dissimilarity of treatment." Id. His analysis of the lawfulness of PRMSA's tariffs gave no weight at all to the collective bargaining agreement. Rather, he took labor considerations into account in fashioning his recommended remedy, i.e., a liberal three-month period for PRMSA to adjust its tariff. Thus, while we continue to believe that Sea-Land was correctly decided, the Commission's relatively brief report and order adopting the

ALJ's initial decision did not provide needed clarification regarding the confused and ambiguous status of "labor considerations" in Shipping Act cases.

* * * *

Following the issuance of the Commission's decision, CONASA and NYSA filed petitions for review in the U.S. Court of Appeals for the District of Columbia Circuit. While the appellate proceeding was pending, the Supreme Court issued its decision in NLRB v. International Longshoremen's Association, 447 U.S. 490 (1980), and Congress enacted the Maritime Labor Agreements Act. Each event affected the review of Sea-Land and requires separate analysis.

F. The Supreme Court's Decision in NLRB v. ILA(I)

Between 1973 and 1979, the NLRB had issued a series of orders finding the Rules on Containers, as applied in various port locations, to be unlawful under the National Labor Relations Act, and these orders had been enforced by the federal courts. However, in 1979, the District of Columbia Circuit issued a decision denying enforcement of the NLRB's orders in two cases in which the agency again had found the Rules unlawful.[28] Because of the conflict among circuits, the Supreme Court granted certiorari.

On June 20, 1980, by a 5-4 vote, the Supreme Court affirmed the D.C. Circuit and held that the NLRB had erred

---

[28] International Longshoremen's Association v. NLRB, 613 F.2d 890 (D.C. Cir. 1979).

as a matter of law in applying the doctrine of work preservation to the Rules. NLRB v. International Longshoremen's Association, 447 U.S. 490 (1980) (NLRB v. ILA(I)).

The NLRB had ruled that the Rules were illegal because they did not preserve traditional work opportunities for longshoremen, but instead sought to acquire new work that longshoremen had not performed historically. The Supreme Court stated that to be a lawful work preservation agreement, the agreement "must have as its objective the preservation of work traditionally performed by employees represented by the union. Second, the contracting employer must have the power to give the employees the work in question - the so-called 'right of control test' . . . ." 447 U.S. at 504, citing NLRB v. Pipefitters, 429 U.S. 507 (1977). The Court then indicated that fundamental to this analysis is a determination of the work that the agreement allegedly seeks to preserve. The NLRB consistently had held that the "work in controversy" was the loading and unloading of containers by employees of consolidators and truckers at off-pier locations. The Court held that the NLRB was required to focus instead on work traditionally performed by longshoremen.

> The next step is to look at how the contracting parties sought to preserve that work, to the extent possible, in the face of a massive technological change that largely eliminated the need for cargo handling at intermediate stages of the intermodal transportation of goods, and to evaluate the relationship between traditional longshore work and the work which the Rules attempt to assign to ILA members.

Id. at 509 (footnote omitted). The Court noted that, unlike previous cases it had decided involving work preservation agreements, the union here

> did not simply insist on doing the work as it had always been done and try to prevent the employers from using container ships at all . . . . Instead, ILA permitted the great majority of containers to pass over the piers intact, reserving the right to stuff and strip only those containers that would otherwise have been stuffed or stripped locally by anyone except the beneficial owner's employees.

Id. at 510.

The Court stated that with a proper definition of the work in controversy, the NLRB could determine on remand whether the Rules had a lawful work preservation objective and whether the CONASA members - the contracting employers - had the right to control the stuffing and stripping of containers.

> [The NLRB's] determination will, of course, be informed by an awareness of the congressional preference for collective bargaining as the method for resolving disputes over dislocations caused by the introduction of technological innovations in the workplace. . . . Thus, in judging the legality of a thoroughly bargained and apparently reasonable accommodation to technological change, the question is not whether the Rules represent the most rational or efficient response to innovation, but whether they are a legally permissible effort to preserve jobs.

447 U.S. at 511. The Court also specifically refused to address arguments by certain parties opposed to the Rules that the Rules violated the 1916 Act and the Intercoastal Act, stating that "[t]hese contentions present difficult and complex problems which are not properly before us." Id. at 512.

Chief Justice Burger, writing for the four dissenters, argued that the Rules' 50-mile limit was arbitrarily chosen, that the majority's logic could easily sanction rules applying to work done 100 miles inland, that the Rules amounted to featherbedding and that the effect of the Court's decision would be to take "work from non-ILA members to provide economically useless work for ILA members." 447 U.S. at 527.

G. The Maritime Labor Agreements Act

On August 8, 1980, Congress substantially altered the Commission's jurisdiction over collective bargaining agreements and other agreements involving labor interests when it enacted the Maritime Labor Agreements Act ("MLAA"), Pub. L. No. 96-325, 94 Stat. 1021. The statute and its legislative history also provide guidance regarding FMC regulation of individual carrier activities that are related to labor agreements, such as the Rules on Containers.

The MLAA, the passage of which was supported actively by the Commission before Congress, was designed specifically to negate the court and FMC decisions, including Volkswagen and PMA, which required maritime collective bargaining agreements and assessment agreements to be approved by the Commission before going into effect. Echoing Justice Powell's dissent in PMA, the Senate Report stated:

> As a consequence of these court decisions, collective bargaining in the maritime industry has been seriously disrupted because the parties do not know whether they have in fact made an

> agreement until the Commission approves it. The maritime industry has thus been singled out as the only industry in the United States which is deprived of the benefits of the express national policy of free and unfettered bargaining without government intervention.

S. Rep. No. 854, 96th Cong., 2d Sess. 1 (1980). "The MLAA was intended to restore order and some certainty to the collective bargaining process . . . . Because of Volkswagen, collective bargaining agreements and assessment agreements . . . were illegal until the FMC had specifically approved them. It was the delay in approval that disrupted labor relations." California Cartage Co., Inc. v. United States, 721 F.2d 1199, 1206 (9th Cir. 1983).

The MLAA completely exempted from FMC jurisdiction under the 1916 Act (including sections 14, 16 and 17) and the Intercoastal Act all "maritime labor agreements," which were defined as including

> any collective bargaining agreement between an employer subject to this Act, or group of such employers and a labor organization representing employees in the maritime or stevedoring industry, or any agreement preparatory to such a collective bargaining agreement among members of a multi-employer bargaining group, or any agreement specifically implementing provisions of such a collective bargaining agreement or providing for the formation, financing, or administration of a multiemployer bargaining group.

46 U.S.C. § 801 (1982). If the MLAA had been in effect at the time, this exemption would have covered all three agreements presented in BSA and the PMA-ILWU agreement in PMA.

Mech Fund-type assessment agreements, such as those in Volkswagen and NYSA, were given separate, distinct

treatment. Any such agreement that provided for the funding of collectively bargained fringe benefits on a uniform man-hour basis would qualify for the general exemption from FMC jurisdiction described above. However, in order "to ensure equal treatment of shippers, cargo and localities and to prevent abuses made possible by concerted activity of ocean common carriers and others," S. Rep. No. 854, supra, at 2, assessment agreements that, like the Volkswagen Mech Fund agreement, provide for fringe benefit funding on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized, remained subject to the Commission's filing and approval jurisdiction (even if they are part of a collective bargaining agreement) under the following unique procedure (94 Stat. 1021-22):

1. the assessment agreement is deemed approved upon filing so that it can be implemented immediately;

2. the approval continues unless and until the FMC sets the agreement aside or modifies it as a result of a complaint proceeding (the Commission cannot institute a proceeding on its own motion);

3. a complaint can be filed by any person affected by such an assessment agreement at any time within 2 years from the filing date.

4. the Commission is under a mandate to issue its final determination within one year from the date of filing of the complaint; and

5. to the extent that a complainant had borne, either directly or indirectly, assessment charges ultimately set aside or modified by the FMC, it is entitled to assessment adjustments from the date of the filing of the complaint in the form of prospective credits against future assessments or charges.

The Commission has issued several decisions under these complaint procedures. Port of New York and New Jersey v. New York Shipping Association, ___ F.M.C. ___, 23 S.R.R. 21, order discontinuing proceeding, 23 S.R.R. 226 (1985); California Cartage Co., Inc. v. United States, 721 F.2d 1199 (9th Cir. 1983), order on remand, ___ F.M.C. ___, 23 S.R.R. 420 (1985), aff'd, 802 F.2d 353 (9th Cir. 1986); Boston Shipping Association, Inc. v. FMC, 706 F.2d 1231 (1st Cir. 1983).[29] These cases typically involve a fairly narrow issue as to whether an assessment formula imposes charges on the complaining port, carrier or shipper that are not reasonably related to the transportation services or benefits accruing to the complainant (the "benefits/burdens" test). See generally, Port of New York and New Jersey v. New York Shipping Association, supra, 23 S.R.R. at 48.

In addition to preserving the FMC's authority to provide remedies for concerted unfair treatment of shippers,

---

[29] Boston Shipping Association, Inc. v. FMC concerned the lawfulness of Rule 10 of the Rules on Containers, which governs the collection and distribution to ILA members of container royalties. N. 7, supra. During the proceedings before the Commission in that case, NYSA, intervening in defense of the Rule, contended that the Commission lacked jurisdiction over Rule 10 on the grounds that the Rule constituted a "maritime labor agreement" under the MLAA or, alternatively, that it should qualify for a non-statutory BSA labor exemption. The Commission found that the Rule, in its application to the Port of Boston, did not violate the 1916 Act and further found that its conclusion on the merits obviated the need to resolve NYSA's jurisdiction arguments. On review, the U.S. Court of Appeals for the First Circuit affirmed the Commission's decision on the merits and similarly did not reach the jurisdiction issue. 706 F.2d at 1235-36.

ports or types of cargo brought about by certain kinds of assessment agreements, the MLAA stated that the provisions of the 1916 Act and the Intercoastal Act would continue to apply to:

> any rates, charges, regulations, or practices of a common carrier by water or other person subject to [the 1916] Act which are required to be set forth in a tariff, whether or not such rates, charges, regulations, or practices arise out of, or are otherwise related to a maritime labor agreement.

94 Stat. 1022. This language (commonly called the "tariff matter" provision) appeared in section 5 of the MLAA, and the Senate explained that its intention in adding the provision to the House version of the legislation was to retain "the existing protections of the Shipping Act for shippers, carriers and localities which may be adversely affected by shipping practices which may arise out of maritime labor agreements." S. Rep. No. 854, supra, at 13; see also id. at 14.

The provisions of the MLAA were carried forward into the Shipping Act of 1984. No substantive changes relevant to this proceeding were made by Congress.[30]

The MLAA's "tariff matter" provision, as now set forth in section 5(e) of the 1984 Act, 46 U.S.C. app. § 1704(e),

---

[30] The 1916 Act had empowered the Commission to disapprove, cancel or modify assessment agreements found to be "unjustly discriminatory or unfair as between carriers, shippers, or ports, or to operate to the detriment of the commerce of the United States." The 1984 Act eliminated detriment to commerce as a basis for FMC action. See California Cartage Co., Inc. v. United States, 802 F.2d 353 (9th Cir. 1986).

is the legal basis for the Commission's regulatory jurisdiction over the Rules on Containers. In previous stages of this proceeding, the carriers challenged the applicability of the provision to the Rules. As we shall discuss below, the Commission rejected those arguments in the February, 1982, Interim Report and Order herein and, in its review of the Commission's Sea-Land decision, the U.S. Court of Appeals for the District of Columbia Circuit indicated strongly that the provision would apply to the Rules, although the court did not decide the issue.

A separate issue is whether, in enacting legislation that restricted substantially the FMC's jurisdiction to regulate labor-related agreements, Congress intended also that the Commission should apply "labor considerations," in the form of a BSA labor exemption or in some other manner, in adjudicating the lawfulness of individual carrier practices -- such as the Rules on Containers -- that arise out of a collective bargaining agreement but fall within the MLAA's "tariff matter" provision. Our review of the legislative history of the MLAA does not reveal any sign from Congress that such was its intention. On the contrary, the legislative history indicates that the Commission should not attempt to weigh "labor considerations" in deciding the lawfulness of a "tariff matter."

During the hearings in the House of Representatives in March, 1980, on H.R. 6613 (which ultimately became the MLAA), the ILA and NYSA advocated a total exemption from FMC

regulation for both collective bargaining agreements and for the Rules on Containers. Hearings on H.R. 6613 before the Subcommittee on Merchant Marine of the House Committee on Merchant Marine and Fisheries, 96th Cong., 2d Sess. ("House Hearings") 27-47, esp. 32, 37 (Mar. 11, 1980). ILA president Gleason described the Rules in detail for the House Committee, id. at 39-40, and referred to the Commission's decision in Sea-Land (pending review before the District of Columbia Circuit) as "proof of the FMC's fundamental inexperience in this matter and its inability to flexibly and realistically apply concepts in a maritime antitrust field which it was created to administer." Id. at 32.

The Commission supported the bill's proposed exemption of collective bargaining agreements from the pre-implementation approval requirements of section 15, but Commissioner (then Vice Chairman) Moakley, speaking for the Commission, warned the House Committee that any exemption from the substantive prohibitions of the 1916 Act should be legislated only if Congress was satisfied that shippers, ports and cargoes would be protected adequately under other statutes, such as the antitrust laws. House Hearings at 11-12. As reported out by the Committee and passed by the House, H.R. 6613 contained a partial exemption from sections 16 and 17 of the 1916 Act for "any charge, tax or assessment imposed upon cargo or any shipper or ocean carrier to fund the fringe benefit obligations under a collective bargaining agreement . . .," as well as a complete exemption from

section 15 for collective bargaining agreements and all related agreements, including assessment agreements. H.R. Rep. No. 876, 96th Cong., 2d Sess. 11-12 (1980). The only mention of the Rules on Containers in the House Report came in the context of testimony opposed to the legislation on the ground that FMC regulation was needed to prevent anticompetitive behavior. Id. at 4.

When the Senate considered the legislation three months later, cargo, port and consolidator interests that stood to be adversely affected offered widespread opposition to the exemption for assessment charges contained in the House bill. See, e.g., Hearings on H.R. 6613 before the Subcommittee on Merchant Marine and Tourism of the Senate Committee on Commerce, Science and Transportation, 96th Cong., 2d Sess. ("Senate Hearings") 56 (Boston Shipping Association), 82 (International Association of NVOCC's), 89 (National Customs Brokers and Forwarders Association of America), 95 (Maryland Port Administration) (June 4, 1980). In addition, Commissioner Moakley, again speaking for the Commission, warned the Senate Committee that it was problematic at best whether shippers, ports and cargoes would be protected adequately by other statutes if carrier activities related to collective bargaining agreements were exempted totally from the 1916 Act. Id. at 17-18. Significantly, there was testimony in support of such a total exemption by the Maritime Administration of the Department of Commerce (now Department of Transportation),

which argued that legislation eliminating section 15 pre-implementation review - which would also eliminate antitrust immunity - while retaining post-implementation regulation by the Commission "would be the worst of both worlds." Id. at 9. That agency argued that shippers and like interests would be protected sufficiently under the labor and antitrust laws. Id. The president of PMA, in arguing for a total exemption, warned the Senate Committee that the 1916 Act was "an integrated legislative program for regulation of steamship and terminal company rates and practices . . . [which] was not in any respect designed to deal with labor problems and indeed makes no reference to labor considerations." Id. at 73. The ILA and NYSA again criticized the FMC's Sea-Land decision and urged a complete exemption for the Rules on Containers from the 1916 Act. Id. at 28, 36. However, opponents of the Rules described for the Senate Committee various difficulties caused to non-vessel-operating common carriers ("NVO's") and importers by the Rules, and contended that the legislation should not immunize the Rules from the Shipping Act. Id. at 86-89.

Commissioner Moakley told the Senate Committee that in deciding Sea-Land,

> The Commission did not exercise jurisdiction over the [collective bargaining] agreement between management and labor . . ., but rather over tariff rules of individual carriers. As the Administrative Law Judge said in his initial decision, "A tariff provision is not an agreement; rather it is a unilateral statement of the author of the tariff . . . ." If the Committee does intend to exempt all activities in implementation of collective bargaining activities from Shipping Act scrutiny, that intent must be made clear in the bill.

Senate Hearings, supra, at 16. He further advised the Committee that under the law as it then stood, the Commission was not obliged to review collective bargaining agreements in order to test the defense of a carrier or other person charged with a violation of the 1916 Act and that "[a] tariff stands on its own and must be defended as a tariff." Id. at 12. He urged that the legislation as finally enacted should avoid creating a situation where identical practices of various carriers would be judged differently "simply by virtue of their collective bargaining obligations." Id. at 18. In its Report, the Senate Committee took note of Sea-Land and then, as stated above, described the "tariff matter" provision as an indication of Congress' intent that the new exemption (as adjusted from the House bill) for maritime labor agreements did not change existing law with respect to practices reflected in carrier tariffs. S. Rep. No. 854, supra, at 8-9, 14. It should be noted that by the time the Senate Committee published its Report on July 16, 1980, the Supreme Court had issued NLRB v. ILA(I) and the Committee was aware of that decision. Id. at 9, n. 11.

When the chronology of the legislative process and the various testimonies are considered together, the MLAA can be viewed as a compromise between, in rough terms, "labor" and "shipping" interests. Most of the witnesses appearing in support of the legislation testified that their "labor" interests would be protected sufficiently if the impediment

of section 15 pre-implementation approval was removed, and that they could live with the possibility that an agreement - or, more directly, practices implementing an agreement - might encounter difficulties under other sections of the 1916 Act after the agreement was implemented.[31] Even NYSA indicated that its primary interest was to remove the FMC from the collective bargaining process and that it would go along with the "tariff matter" compromise, if that was the price for legislation. See Senate Hearings, supra, at 19-20, 31. From this perspective, the legislation protects the process of free collective bargaining, rather than any particular carrier practice resulting from that process; such practices, if they must be set forth in the carrier's tariff, remain subject to the Shipping Acts. This result is consistent with the various pre-MLAA judicial opinions opposed to FMC jurisdiction over maritime collective bargaining agreements, beginning with Justice Douglas's

---

[31] The Senate Committee summarized its hearings as follows:

> The witnesses who appeared . . . were nearly unanimous in support of exempting collective bargaining agreements from . . . section 15 of the Shipping Act. The majority of those opposing H.R. 6613 as it passed the House, however, felt the bill went beyond what was necessary to assure free and unfettered collective bargaining, and that it stripped the FMC of jurisdiction to assure equal treatment of shippers, cargo and localities, and to prevent abuses made possible by one [sic] concerted activity of carriers and others.

S. Rep. No. 854, supra, at 10.

dissent in Volkswagen and continuing through the D.C. Circuit's opinion in PMA and Justice Powell's subsequent dissent in that case. Those opinions argued that the proper accommodation between the Shipping Act and federal labor policy required that collective bargaining agreements should be held to be outside the reach of section 15, while implementation of the agreements by the carriers would remain subject to the substantive prohibitions of the Act.

Given those facts, logic compels the conclusion that the balance between "labor" and "shipping" intended by Congress would be upset if "labor considerations" were additionally weighed by the Commission in deciding whether carrier practices set forth in tariffs are unreasonable or unjustly discriminatory in their application to persons protected by the 1916 Act or the 1984 Act. Congress gave the "labor" interests of the carriers (and the maritime unions) all the protection it thought appropriate when it exempted the collective bargaining process and most agreements resulting therefrom from section 15. Despite the testimony from the Maritime Administration, NYSA, the ILA and other witnesses in support of a total exemption, and despite the testimony from the ILA regarding its interest in the Rules on Containers and criticizing the Commission's decision in Sea-Land, Congress gave no indication that it thought Sea-Land was wrong or that "labor interests" should be given additional special consideration if the Commission was called upon to adjudicate the lawfulness under the

Shipping Act of a carrier tariff that had its genesis in a collective bargaining agreement.[32] The president of PMA had warned the Senate Committee that the 1916 Act did not allow for labor considerations and Commissioner Moakley had stated clearly to the same Committee that a tariff is judged only as a tariff. Nevertheless, in adding the "tariff matter" provision to the House bill, the Senate did not indicate that the Commission should adjust its standards for labor.

In sum, the underlying purpose of Congress in enacting the MLAA was that the Commission should return to judging Shipping Act issues raised by provisions in carrier tariffs by normal, historical Shipping Act standards, rather than to continue getting deeper and deeper into labor law issues, as the Commission clearly had been in cases such as BSA and PMA. The MLAA demarcated clearly between labor and shipping concerns, and removed the confusion and uncertainty that had existed previously. In carrying the "tariff matter" provision over into the 1984 Act, the Senate, the original author of the provision, described its purpose as

---

[32] ILA president Gleason had stated in strong terms that his union had no interest in what carriers put in their tariffs:

> And one thing I would like to get over to you, Mr. Chairman is this: That this union does not talk about tariffs. I think that is the companies' business; it's none of our business at all. We do not talk about tariffs. We do not negotiate tariffs at all.

Senate Hearings, supra, at 33.

> . . . to preserve the essential principle that a common carrier cannot alter its statutory common carrier obligations at the bargaining table and to sharpen the jurisdictional boundaries between tariffs and agreements, leaving the latter clearly within the purview of the shipping laws and relegating the latter (with the exception of assessment agreements) to the labor laws.

S. Rep. No. 3, 98th Cong., 1st Sess. 25 (1983). Thus, if the Commission revived the BSA criteria or otherwise attempted to calibrate labor policies or objectives in deciding Shipping Act issues, it appears that we would be going against the will of Congress.

H. Institution of Docket No. 81-11 and Issuance of the Commission's Interim Report and Order

As a result of the Supreme Court's decision in NLRB v. ILA(I), the Rules on Containers were reimplemented briefly by the carriers and the ILA at Atlantic and Gulf Coast ports from January 2, 1981, to February 27, 1981.[33] Implementation of the Rules during this period, however, was haphazard and done on the initiative of individual carriers acting on their own interpretations of the Rules. Further, the carriers did not adopt any formal procedures for the identification of containers affected by the Rules, but instead relied on information from customary shipping documents.[34] At the end of February, the NLRB obtained a

---

[33] The Presiding Officer found that an injunction remained in effect at Philadelphia during this period. I.D. at 65.

[34] I.D. at 65-66.

new injunction barring enforcement of the Rules pending completion of its proceedings on remand from the Supreme Court.[35] This two-month period of implementation of the Rules became the period of record for this proceeding, Docket No. 81-11, which had been instituted a few weeks earlier on February 3, 1981.

In the Order of Investigation commencing this proceeding, 46 Fed. Reg. 11,357 (Feb. 6, 1981), the Commission stated that it had reason to believe that, commencing January 1, 1981, ocean common carriers in the foreign and domestic offshore commerce of the United States had been engaged in practices related to the Rules on Containers that may violate the 1916 Act and the Intercoastal Act. The Commission stated that these practices included:

> [r]efusal to load container cargo aboard vessels without interruption, delay or stripping and restuffing of the container and/or trailer; refusal to deliver container cargo without delay or stuffing and restuffing of the container and/or trailer; refusal to accept container bookings and confirm space on vessels; refusal to supply or make available containers, trailers or other equipment which is owned, leased or used by the carrier, for loading of cargo at NVOCC's, consolidator's and/or shipper's premises; refusal to load cargo unless shipped "loose" to port and stuffed in containers and/or trailers at the pier; passing on to individual NVOCC's, consolidators,

---

[35] Pascarell v. New York Shipping Association, Inc., No. 81-13 (D.N.J.), aff'd, 650 F.2d 19 (3d Cir.), cert. denied, 454 U.S. 832 (1981). Although the injunction standards of the labor laws do not require the usual showing of irreparable harm, this injunction apparently was based in part on arguments that the Rules threatened the livelihood of freight consolidators. 650 F.2d at 21, 22.

> and/or shippers any penalties or fines assessed the carrier for violation of the 50 Mile Container Rules should they occur; and imposing additional charges for stripping and restuffing containers and/or trailers at the pier. In addition, the carriers have apparently failed to reflect these practices in their tariffs.

Id. at 11,358. The substantive statutes listed by the Commission as involved in this proceeding were sections 14 Fourth, 16 First, 17, 18(a) and 18(b) of the 1916 Act and sections 2 and 4 of the Intercoastal Act. The Order of Investigation listed 142 carrier respondents. The proceeding initially was limited to the submission of affidavits and memoranda directly to the Commission.

The ILA, NYSA and CONASA intervened in support of the Rules. Intervening in opposition were the International Association of NVOCC's, an unincorporated trade association of non-vessel-operating common carriers; the National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA"); the Florida Customs Brokers and Forwarders Association; the American Warehousemen's Association ("AWA"); and the American Trucking Associations ("ATA"), whose members are state trade associations representing interstate truckers. The Commission's Bureau of Hearing Counsel also was made a party to the proceeding.

On February 5, 1982, after the parties had submitted their initial pleadings, the Commission issued an Interim Report and Order. ___ F.M.C. ___, 21 S.R.R. 544. The number of respondents was reduced to 122 as 17 carriers were dismissed from the proceeding because they had shown by

affidavit that they were not common carriers by water, did not offer service at ILA ports along the Atlantic and Gulf Coasts, or carried no containers. Id. at 547, 561.[36] In order to expedite the proceedings and to focus more on the allegedly discriminatory aspects of the Rules, the Commission also announced that it was removing as issues in the proceeding whether civil penalties should be assessed for violations of law found against any carrier respondent, and whether any of the carriers had violated section 18(b) of the 1916 Act or section 2 of the Intercoastal Act by implementing specific Rules on Containers practices that were not published in their tariffs. Id. at 545, n. 1, 554.

The Commission then addressed certain legal issues that had been raised by the parties. We held that the "basic features" of the Rules must be published in the carriers' tariffs, because the Rules affect the "privileges and facilities" offered by carriers (i.e., their containers and piers) and may result in changes to the rates and charges paid by shippers. Id. at 554-55. The Commission also held that the "tariff matter" provision of the MLAA did not diminish our authority to regulate carrier practices that must be set forth in tariffs, id. at 555-56, and that the Rules should not be granted a BSA labor exemption because, by being published in carrier tariffs, they are imposed on persons outside the collective bargaining process, including

---

[36] Three additional carriers had been dismissed by Commission order on June 12, 1981.

shippers and consolidators, and thus fail to meet the third BSA criterion. Id. at 556. In this regard, the Commission also stated:

> The Container Rules have a direct and practical impact upon both labor and shipping interests. Nonetheless, a Commission order prohibiting this particular method of resolving labor/management conflict as an unjust ocean carrier practice would not undermine the basic collective bargaining process created by the National Labor Relations Act, whereas the absence of Shipping Act regulation would eliminate the fundamental premise of the Shipping Act and other common carrier statutes -- that similarly situated shippers be treated equally.*/

---

*/ It is the integrity of the collective bargaining process and not the value of each bargained for benefit which must be balanced against the Shipping Act's guarantees of fair, essentially equal treatment. The effect of regulating ocean carrier practices under Shipping Act sections 14, 16, 17 and 18 is significantly different from the effect of subjecting collective bargaining agreements to the advance filing and approval requirements of section 15. Even if remedying a discriminatory tariff practice presented a plain choice between the protection of a particular union and protection of a particular class of ocean shippers, the more specific legislative purpose of the Shipping Act requires that the Commission choose the latter -- provided the final action taken is no broader than necessary to remedy the unjust discrimination in question.

Id. at 557 (other footnote omitted) (emphasis in original).

Having rendered those conclusions of law, the Commission stated that it was necessary to develop further certain factual issues in order to determine "which Shipping Act sections have been violated by which of the remaining Respondents." 21 S.R.R. at 560. The Commission further stated that the parties

> may introduce such additional evidence as the Presiding Officer deems relevant to whether the Container Rules, as presently formulated, create discriminations or commercial burdens so unreasonable as to violate the above-referenced Shipping Act sections. Because the Commission has today ruled that the Container Rules are not exempt from Shipping Act regulation, despite their inclusion in ILA collective bargaining agreements, no further evidence regarding labor conditions shall be accepted by the Presiding Officer. If the Respondents have a defense to the Shipping Act violations alleged in the Order of Investigation, it must be a defense relating to transportation conditions, not national labor relations policy.

Id. at 561.[37]

I. The District of Columbia Circuit's Review of "Sea-Land"

On March 2, 1982, less than a month after the Commission issued the Interim Report and Order in Docket No. 81-11, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision on review of the Commission's 1978 Sea-Land decision on the Rules on Containers. Council of North Atlantic Shipping Associations v. FMC, 672 F.2d 171 (D.C. Cir.), cert. denied, 459 U.S. 830

---

[37] Commissioner Moakley issued a separate opinion that concurred in the majority's result but argued that the reference to the BSA labor exemption was contrary to the intent of the MLAA. 21 S.R.R. at 562.

The ILA and the carriers filed a petition for review of the Interim Report and Order in the U.S. Court of Appeals for the District of Columbia Circuit. New York Shipping Association, Inc. v. FMC, D.C. Cir. No. 82-1347. The case subsequently was terminated without prejudice to its reinstatement following issuance of the Commission's final decision in this proceeding.

(1982) ("CONASA").[38] The court reviewed the history of containerization, the labor difficulties and negotiations, and the development of the Rules. It summarized the competing interests thusly:

> The Rules on Containers impose burdens on importers, exporters, consolidators, distributors, and others within the 50-mile zone. If containers could move freely across the pier without ILA handling, regardless of the identity of the shipper, the place of origin, or the destination, then small shippers within the 50-mile zone could take full advantage of the benefits of container shipping. In contrast, the stuffing and stripping requirements allegedly increase shipping delays and labor costs, augment the risk of loss, pilferage, and damage in transit due to improper stowage, and deprive the shippers of the special services provided by consolidators. NVO's and distributors previously operating within the 50-mile zone have been severely affected and in some cases have been forced to cease operations.
>
> On the other hand, the 50-mile rule and the enforcement provisions of the Dublin Supplement have averted further reductions of employment opportunities for ILA longshoremen and have reduced labor-management strife on the waterfront. Petitioners warn that if the Rules are set aside, the longshoremen may renew their demand for stripping and stuffing of all containers, not only those subject to the 50-mile rule. "Economic warfare would be the inevitable result," petitioners contend.

672 F.2d at 177-78 (footnotes omitted) (citing petitioners' reply brief at 15-16). Petitioners CONASA and NYSA

---

[38] CONASA's petition for review had been timely filed in 1978, but the court had held the case in abeyance at the request of the parties, pending the outcome of the related labor law litigation, which culminated in NLRB v. ILA(I). See 672 F.2d at 179, n. 66. Following the Supreme Court's remand in that case, an NLRB administrative law judge had issued on September 29, 1981, an initial decision under the corrected legal definition of "work in controversy." Id. at 173, n. 4. His decision upheld the 50-Mile Rules in large part. Id. at 180. The proceeding was before the NLRB at the time the D.C. Circuit decided CONASA.

addressed their briefs solely to jurisdictional issues, asserting that they would hold their challenge to the merits of Sea-Land "in reserve." Id. at 179. They contended that the Commission completely lacked jurisdiction over the Rules as set forth in PRMSA's tariff, because the provisions in question were work preservation rules derived directly from a collective bargaining agreement and as such were within the exclusive jurisdiction of the NLRB. They further contended that the Rules as applied by PRMSA were not covered by the "tariff matter" provision of the MLAA and therefore were not within the Commission's jurisdiction and, in any event, should have been granted a nonstatutory BSA labor exemption.

The court first examined the nature of the NLRB's jurisdiction and held that that agency's examination of the Rules differs substantially from the FMC's. It stated that "[t]he Rules govern the relationship between labor and management; incorporated into tariff provisions filed by steamship companies, they also govern the relationship between shipping customers and steamship operators." 672 F.2d at 180-81. It concluded that the NLRB does not have exclusive jurisdiction over the Rules because "[t]he NLRB's interpretation of [the National Labor Relations Act] does not answer the questions the FMC is required to ask - do the Rules unduly discriminate against certain shippers, and are they unjust and unreasonable?" Id. at 181 (footnote omitted).

The court then stated that the MLAA's "tariff matter" provision "appears to retain existing FMC jurisdiction over the Rules on Containers." 672 F.2d at 182. The court cited the MLAA's legislative history and "well established shipping law doctrine" that all terms and conditions relating to a carrier's acceptance and carriage of cargo must be set forth in its tariffs. Id.[39] However, the court declined to actually rule on the scope of the "tariff matter" provision, choosing instead to rule more narrowly that section 6 of the MLAA specifically stated that the statute had no effect on existing FMC jurisdiction as applied to any formal proceeding commenced prior to the statute's effective date, which clearly included the Sea-Land Dockets Nos. 73-17 and 74-40.

With regard to CONASA's final argument concerning the applicability of a non-statutory BSA labor exemption to PRMSA's Rules on Containers, the court first stated:

> No judicial precedents address the precise issues raised in this case: whether any labor-management agreements are exempt from the substantive provisions of the shipping laws, and, if so, whether enforcement of the collectively-bargained Rules on Containers qualifies for exemption. Prior cases delineating the nonstatutory labor exemption from the shipping laws have dealt with the pre-implementation filing and approval requirements of Section 15 of the Shipping Act of 1916, not with the prohibitions against unreasonably discriminatory and unjust rates and practices in Sections 14, 16, and 18.

---

[39] The court cited authorities identical to those relied upon by the Commission for the same conclusion in its Interim Report and Order in this proceeding. 672 F.2d at 182, n. 96-98; 21 S.R.R. at 554-55.

672 F.2d at 183 (footnote omitted).

The Commission had advanced two grounds for denying a labor exemption for the Rules. First, the Commission argued that the BSA exemption applied only to section 15 approval issues and not to any other section of the 1916 Act. Second, the Commission argued that, even assuming that a labor exemption could be applied properly to the substantive provisions of that Act and to tariffs as well as agreements, the Rules on Containers do not satisfy the BSA criteria. The court's ruling turned on the latter argument. After noting that the other three BSA criteria were apparently met, 672 F.2d at 187, n. 127, the court held that the Rules did not qualify for an exemption because they are imposed on third parties outside the collective bargaining agreement and therefore fail to meet the third BSA criterion. The court acknowledged that the antitrust cases involving a labor exemption question had focused on the collective bargaining agreement's alleged effect on the employer's own competitors, but held that in the shipping context, it was appropriate to broaden the focus to include effects on the carriers' customers as well as their competitors. Id. at 187-88, n. 131 and accompanying text. The court stated:

> [T]he Rules have direct and probable effects on shippers' interests and on competition in the shipping industry, both of which are subject to FMC regulation. The record fully documents the impact that enforcement of the Rules would have on importers, exporters, consolidators, distributors, and others who transport goods by sea. Consolidators are competitors as well as customers of the steamship lines, offering alternative arrangements for ocean transportation of smaller

> shipments. Those consolidating companies which previously operated within the 50-mile zone are deprived of business under the Rules, or subjected to substantial cost increases and shipping delays, in order to preserve the work opportunities of longshoremen employed at the docks by steamship operators.

Id. at 188 (footnote omitted).

Having thus disposed of the petitioners' jurisdictional arguments, the court, on its own initiative, remanded the proceeding back to the Commission for reconsideration of its decision on the merits. The court said that the Commission had not examined the implications of the Supreme Court's decision in PMA, which the D.C. Circuit stated "asserts the importance of labor policy in reaching substantive shipping law decisions," 672 F.2d at 189, and the Supreme Court's decision in NLRB v. ILA(I), which the D.C. Circuit stated "discusses the role of collective bargaining in resolving the problems created by technological job displacement." Id.

Judge MacKinnon issued a separate opinion in which he concurred, with some reservations, with the majority's disposition of the jurisdiction arguments advanced by the petitioners. In that connection, Judge MacKinnon stated:

> There is a very substantial distinction between collective bargaining agreements . . . on the one hand, and tariffs on the other. This distinction was brought to the attention of Congress in hearings on the MLAA both by the FMC and by the Union; the result was the explicit distinction in section 5 of the MLAA between maritime labor agreements and matters "required to be set forth in a tariff." As intervenors rightly suggest, to ignore the distinction would be to reduce the incentive of a carrier--even one bargaining at arm's length--to bargain for labor

> agreements that are consistent with the Shipping Act's policies.
>
> It must be remembered that the Shipping Act has as its primary purpose the protection of shippers, not carriers. From the standpoint of the shipper, the terms set forth in a tariff are the same regardless of whether they had their genesis in a collective bargaining agreement; the tariff is the only statement of terms imposed "directly" upon the shipper. National labor policy, while it may require that the FMC be kept out of the labor-management bargaining process, does not prohibit the FMC from applying the substantive provisions of the Shipping Act to protect shippers from being forced to bear the costs of carriers' losses at the bargaining table merely because they were incorporated in a collective bargaining agreement.

672 F.2d at 191 (footnotes omitted) (emphasis in original). However, he dissented from the court's decision to remand the case to the Commission, arguing that there was nothing in either PMA or NLRB v ILA(I) "that would cause the FMC to consider any questions of fact or law not previously considered and ruled upon." Id. at 192.

J. Developments Subsequent to "CONASA"

On May 19, 1982, the Commission issued two orders. The first was issued in this proceeding and was entitled "Amendment of Interim Report and Order." 21 S.R.R. 845. Therein, the Commission stated that the D.C. Circuit's decision in CONASA "made clear that labor policy factors must be considered in Shipping Act deliberations," id. at 846, and that the statement in the Interim Report and Order excluding any further evidence regarding labor conditions would be rescinded. The Interim Report was amended further by the addition of a new ordering paragraph, which stated:

> IT IS FURTHER ORDERED, That the parties may present evidence and otherwise address the nature and extent of any labor policy consideration which might affect the lawfulness of the Container Rules under the sections of the Shipping Acts here at issue and the remedy to be applied for any violations of such sections . . . .

Id. Commissioner Moakley concurred in the Commission's action only to the extent that labor considerations would be relevant to the Commission's eventual choice of remedy for any 1916 Act violations. He otherwise argued that the Commission majority had interpreted CONASA too broadly. Id. at 846-47.

The second Commission order of May 19, 1982, entitled "Report and Order on Remand," was issued in Dockets Nos. 73-17 and 74-40. 21 S.R.R. 852. That order advised that, pursuant to the D.C. Circuit's order of remand, the Commission had "applied the teachings of PMA and ILA to the record of this proceeding and [was] convinced that neither requires any changes in the substantive scope of our earlier determinations made under the shipping statutes." Id. at 853. The Commission submitted that "PMA says nothing about the process of applying the shipping laws to labor related conduct aside from the expressed need of the Commission to be sensitive to labor concerns in making such application," id., and that NLRB v. ILA(I) dealt only with obligations under the labor laws and specifically refused to reach Shipping Act issues. The Commission reviewed its Sea-Land decision and pointed out that it had thoroughly discussed the origin of the Rules on Containers in collective bargaining agreements and had acknowledged the ILA's interest in preserving jobs in the

face of declining man-hours. However, the Commission reiterated that "the unreasonable and discriminatory effects of PRMSA's tariff rule upon certain classes of shippers" (id. at 854) rendered the rule unlawful under the 1916 Act.[40] The

---

[40] The Commission summarized the grounds for its action as follows:

> First, the Commission held that requirements that loaded containers be stuffed and stripped on the piers, that containers not be given to consolidators, and that inbound cargo not delivered to a shipper operating its own warehouse be stuffed and stripped on the piers unless stored for 30 days prior to delivery, were unjust and unreasonable within the meaning of Section 18(a) of the Shipping Act, 1916 and Section 4 of the Intercoastal Shipping Act, 1933 (46 U.S.C. § 817 and § 845a). The basis for this finding was that: (a) there existed no transportation justification for the transfer on the piers of cargo already in containers into other containers, or the payment of a transfer charge for such service; (b) the assessment of penalties against shippers when containers were not stuffed and stripped bore no relationship to the cost of transportation or the handling of the container; (c) the rules were ambiguous on their face; and (d) the rules were discriminatory.
>
> Second, the Commission held that PRMSA rules [sic]: (a) unfairly treated and unjustly discriminated against consolidators by denying them transportation facilities (i.e., containers) furnished other shippers, and making other transportation facilities (i.e., piers) unequally available to shippers in violation of section 14, Fourth of the 1916 Act (46 U.S.C. § 812); and (b) unduly and unreasonably preferred certain shippers and consignees and unduly and unreasonably prejudiced and disadvantaged other shippers and consignees in violation of section 16, First of the 1916 Act (46 U.S.C. § 815) by permitting shippers or consignees who load or unload containers at their own facilities with their own employees to avoid restuffing and restripping on the piers, while requiring otherwise similarly situated shippers and consignees to have their containers restuffed and restripped on the piers and to pay an additional charge for such service.

21 S.R.R. at 855 (footnotes omitted).

Commission asserted that it had considered labor concerns to the extent appropriate by proceeding cautiously in fashioning its remedy, which was limited to a cease and desist order that allowed PRMSA to design its own corrected tariff. The Commission stated that "[a]lthough this remedy bars certain particular methods of resolving labor/management conflicts, it in no way undermines the collective bargaining process itself. The Commission asserted no jurisdiction over any portion of the collective bargaining agreement." Id. at 857.

Having thus responded to the D.C. Circuit's order of remand, the Commission again discontinued Dockets Nos. 73-17 and 74-40. We noted that Docket No. 81-11 had been instituted to determine the lawfulness of practices of numerous carriers, including PRMSA, arising out of the Rules contained in the new (1980) collective bargaining agreement. In that connection, we stated:

> Nothing stated herein is to be construed as a prejudgment of any issues raised in Docket No. 81-11. The parties in that proceeding are free under the terms of the amended Interim Order [issued the same day] to address the influence of PMA and ILA with respect to the record to be developed in that proceeding. This order is restricted to an analysis of PMA and ILA as they apply to the evidentiary record and decision of the Commission in Dockets 73-17 and 74-40.

21 S.R.R. at 858.

However, on July 2, 1982, the D.C. Circuit issued a "Supplemental Opinion Following Remand," unofficially reported at 21 S.R.R. 1057. The court vacated the

Commission's dismissal of Dockets Nos. 73-17 and 74-40, and ordered the Commission to defer further action in those proceedings until the Supreme Court acted on a pending petition by CONASA for certiorari regarding the D.C. Circuit's decision and until the Commission completed this proceeding, which the court said "may shed further light on the shipping law issues involved" in Dockets Nos. 73-17 and 74-40. Id. at 1058. The court then denied on September 23, 1982, a petition by the Commission for rehearing en banc with regard to the Supplemental Opinion.

The Supreme Court denied certiorari on October 4, 1982. 459 U.S. 830. On November 18, 1982, the Commission issued an order reopening Dockets Nos. 73-17 and 74-40 and staying all action in them pending further order.

K. The Final NLRB Litigation

On February 28, 1983, the NLRB issued a decision adopting the findings and recommendations of an administrative law judge that, under the proper standard of law as defined by the Supreme Court in NLRB v. ILA(I), the Rules on Containers represented a lawful work preservation agreement, except as they applied to a trucking practice known as "shortstopping" and certain warehousing

practices.[41] International Longshoremen's Association (Dolphin Forwarding, Inc.), 266 N.L.R.B. 230 (1983), aff'd in part and rev'd in part sub nom. American Trucking Associations, Inc. v. NLRB, 734 F.2d 966 (4th Cir. 1984), aff'd sub nom. NLRB v. International Longshoremen's Association, 473 U.S. 61 (1985) (NLRB v. ILA(II)). The NLRB specifically defined the "work in controversy" as "the initial loading and unloading of cargo within 50 miles of a port into and out of containers owned or leased by shipping lines having a collective bargaining relationship with the ILA." 266 N.L.R.B. at 236.[42] The NLRB further found that the 50-mile zone was based on a compromise worked out by the ILA and NYSA in 1968, which was intended to preserve for

---

[41] "Shortstopping" is the loading or unloading of full-shipper-load containers by truckers at their own pier terminals in connection with surface transportation. For example, on import cargo, truckers sometimes unload cargo at their local terminal and then reload it in order to combine smaller loads into one cargo truckload for inland delivery, or to comply with local safety regulations. The traditional warehousing practices at issue included the ongoing storage of a manufacturer's goods for distribution on short notice to customers based on future orders, and the ongoing storage of a company's purchased inventory for distribution on short notice to its foreign facilities as demand required.

[42] The Board did not discuss the administrative law judge's rejection of an argument made by opponents of the Rules that the steamship lines did not have the "right to control" the stuffing and stripping of containers - the second part of the Supreme Court's test established in NLRB v. ILA(I). The opponents had argued that because the FMC had found in Sea-Land that the Rules were unlawful under the 1916 Act, the ocean carriers could no longer control the work preserved by the Rules. The ALJ ruled that the FMC decision was to be regarded as having no influence upon the review of the Rules under the labor laws. 266 N.L.R.B. at 267.

longshoremen that portion of the total container work in the Port of New York that they actually were performing at the time (approximately 20 percent).

The NLRB petitioned the U.S. Court of Appeals for the Fourth Circuit for enforcement of its orders with respect to shortstopping and the warehousing practices, while petitions for review of the NLRB's decision were filed by trucking, consolidator and warehousing interests. In the meantime, on April 18, 1983, the Rules were reimplemented to the extent permitted by the NLRB's decision.[43]

The Fourth Circuit held on May 9, 1984, that the NLRB's general determination that the Rules were a lawful work preservation agreement under the two-step approach set forth by the Supreme Court in NLRB v. ILA(I) was supported by substantial evidence. However, the court reversed the NLRB on the shortstopping and warehousing issues. The court's decision was based solely on labor law considerations. It contains no reference to the impact of the Rules on consolidators or other third parties; the court stated that "it is not our function as a court of review to weigh the economic cost of the Rules." 734 F.2d 966, 979.

---

[43] A subsequent attempt by the FMC in 1983 to enjoin the Rules pending completion of this investigation was unsuccessful. The district court found that the equities presented to it were essentially equal, rather than strongly favoring the plaintiff, as the law requires. United States v. ABC Containerline N.V., 572 F.Supp. 150 (S.D.N.Y.), protective appeal dismissed, No. 83-6354 (2d Cir. Dec. 13, 1983).

The NLRB then petitioned the Supreme Court to review the Fourth Circuit's holding with respect to the shortstopping and warehousing issues, while opponents of the Rules sought a review of the question of the legality of the Rules in their entirety. The Supreme Court granted certiorari to review only the issues raised by the NLRB. 469 U.S. 1188 (1985); 473 U.S. at 73.

In a 6-3 decision issued on June 27, 1985, the Supreme Court affirmed the Fourth Circuit and held that the Board erred in two respects:

> In our view, the Board committed two fundamental errors. First, by focusing on the effect that the rules may have on "shortstopping" truckers and "traditional" warehousers, the Board contravened our direction that such extra-unit effects, "no matter how severe," are "irrelevant" to the analysis . . . . "So long as the union had no forbidden secondary purpose" to disrupt the business relations of a neutral employer . . ., such effects are "incidental to primary activity."
>
> Second, we believe the Board misconstrued our cases in suggesting that "eliminated" work can never be the object of a work-preservation agreement. Technological innovation will often by design eliminate some aspect of an industry's work . . . . "Elimination" of work in the sense that it is made unnecessary by innovation is not of itself a reason to condemn work preservation agreements . . .; to the contrary, such elimination provides the very premise for such agreements.

473 U.S. at 79, 80-81 (citations omitted). Thus NLRB v. ILA(II) also specifically excluded from consideration the effect of the Rules on outside parties. The Court concluded by addressing the argument raised by the dissent that the Rules are an illegal effort by the ILA to frustrate full implementation of the technological advances attributable to

containerization. The Court indicated that there was no basis for this position in view of (1) Congress' commitment to the resolution of labor disputes through the collective bargaining process, and (2) the lack of any support in the labor statutes for the argument that Congress intended to prohibit arrangements such as the Rules on Containers as a response to the adverse effects upon workers resulting from changing technology. The Court stated:

> Under the Rules on Containers, the ILA has given up some 80% of all containerized cargo work and the technological "container revolution" has secured its position in the industry. We have often noted that a basic premise of the labor laws is that "collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole . . . ." The Rules represent a negotiated compromise of a volatile problem bearing directly on the well-being of our national economy.

Id. at 84 (citation omitted). Thus, after twelve years of litigation, the lawfulness of the Rules on Containers under the federal labor statutes was established conclusively.

The decisions by the NLRB and the courts have made it clear that the heart of the Rules on Containers, and the chief concern of the ILA, are the loading and unloading of containers within 50 miles of the ocean pier. Those activities were deemed to be preservation of work traditionally performed by ILA longshoremen. However, other provisions of the Rules that, for example, distinguish between beneficial owners of the cargo and other shippers, i.e., NVO's, and require that NVO cargo must be stuffed and stripped, that forbid carriers from providing containers to

NVO's and other consolidators, and that provide a "warehouse exception" for import cargo but not for export cargo, were not even discussed, let alone approved, by the NLRB and the courts. There is no basis for according any labor policy considerations to those provisions, which essentially are mechanisms devised by the ILA and acquiesced to by the carriers to enforce the work preservation policies embodied in the actual stuffing and stripping provisions.

L. Further Proceedings in Docket No. 81-11

Following the Commission's May 19, 1982, amendment of its Interim Report and Order to allow for the introduction of evidence relating to labor factors, this investigation continued before the Presiding Officer. On June 14, 1982, two additional carriers, Central Gulf Lines and Pan American Line, were dismissed as respondents. Public hearings were held in Washington, D.C. on April 19-22, 25 and 27-29, July 6 and August 4, 1983. More than 200 exhibits were admitted into evidence. After the close of briefing, Congress enacted the Shipping Act of 1984 on June 18, 1984. The Presiding Officer then ordered the parties to file supplemental memoranda on the application of the 1984 Act to this proceeding. On February 13, 1985, the Presiding Officer served his Initial Decision, which found no violations of law. After Exceptions and Replies to Exceptions were filed by the parties, the Commission heard oral argument on February 20, 1986.

1. The Initial Decision

The Presiding Officer found that the Rules on Containers are not justified by transportation conditions and, in a "traditional" Shipping Act proceeding, would violate the 1916 Act, the 1984 Act and the Intercoastal Act. I.D. at 53, 60-61, 66-68. However, he believed that the Rules instead must be judged by the Commission under a standard that includes "labor considerations." As already noted, he found certain flaws and inconsistencies in the Commission's Sea-Land decision against the Rules. Id. at 30, et seq. In addition, he construed the District of Columbia Circuit's CONASA review of Sea-Land, including the court's post-decision "Supplemental Opinion Following Remand," as an indication that the court was unhappy with the Commission's treatment of labor factors in Sea-Land. However, he acknowledged that "[t]he Court did not . . . give even the slightest hint as to just what it was in the Commission's handling of the issue that caused it concern." Id. at 33.

The Presiding Officer proposed a new methodology to reconcile "labor policy" with the Shipping Acts. He revived the BSA labor exemption test and stated that the four BSA criteria "are relevant to a judgment that a carrier's activity which might violate the shipping statutes is 'justified' by 'labor policy considerations.'" I.D. at 44. Here, he pointed out, three of the four BSA criteria have

already been settled by the NLRB and the courts: the underlying collective bargaining was in good faith over a matter of legitimate concern to the union and not tainted by a conspiracy between labor and management. The Presiding Officer focused on the remaining BSA criterion, i.e., whether the collective bargaining agreement imposed its terms on entities outside the collective bargaining group.

As applied to the Rules on Containers, he constructed a test based on this criterion whereby business harm done to outside entities, i.e., shippers, consolidators, etc., by the Rules would be balanced against the benefits derived by the ILA from the Rules. I.D. at 45-50. He conceded that injury is not an essential element in "traditional" FMC cases involving allegedly discriminatory or unreasonable practices, id. at 50, and that his own "balance of interests" test had difficulties of its own,[44] but he proceeded to hold that the Rules' opponents had failed to meet their burden of proving that they had suffered measurable harm from the Rules. Id. at 51-52. The Presiding Officer had analyzed at the beginning of his decision the testimony and other evidence proferred by the Rules' opponents. Id. at 8-28. He found such evidence to

---

[44] In this connection, the Presiding Officer observed that the Rules posed issues that are essentially social, i.e., "which of two classes of society, business or labor, must bear the brunt of a particular technological innovation," and perhaps should be resolved through the legislative rather than adjudicative process. I.D. at 51, n. 44.

be unsupported by specific quantification of business loss and too vague and generalized. Id. at 51. He therefore concluded that under his "balance of interests" test, no violations of law had been established under any of the relevant statutes (including sections 10(c)(1)-(2) of the 1984 Act, id. at 70-74).[45] Because he found that the Rules' opponents had failed to meet the burden assigned to them by his test, the Presiding Officer made no findings regarding the extent of actual benefits realized from the Rules by the ILA.[46]

2. Exceptions

a. Carriers/ILA

Despite their success before the Presiding Officer, the carrier respondents and the ILA submitted joint Exceptions to "a few subsidiary findings and conclusions, none of which undermines the fundamental soundness of [the Presiding Officer's] decision." Respondents' Exceptions at 2. First,

---

[45] Section 10(c) of the 1984 Act states that:

> No conference or group of two or more common carriers may --
>
> (1) boycott or take any other concerted action resulting in an unreasonable refusal to deal; [or]
>
> (2) engage in conduct that unreasonably restricts the use of intermodal services or technological innovations . . . .

46 U.S.C. app. § 1709(c).

[46] The Presiding Officer noted briefly the dispute among the parties whether containerization in fact had been the major cause of loss of ILA man-hours in New York. I.D. at 29-30.

they except to the Presiding Officer's conclusion that the entities represented by the Rules' opponents are "shippers." See I.D. at 52-53. The significance of this argument lies in the fact that certain sections of the 1916 Act are limited by their terms to transactions involving shippers. The carriers/ILA contend that truckers, warehousemen, freight forwarders and customs brokers are not shippers because they have no beneficial interest in the cargo and have no involvement with its ocean transport other than in providing services to actual shippers. They concede that NVO's are shippers in their relationship with the vessel-operating ocean carrier, but insist that for purposes of this proceeding, the interest at stake for NVO's should be defined narrowly as the loading and unloading of containers, which is a carrier function, not a shipper function. They argue that the passage of the 1984 Act, which for the first time contained a specific definition of an NVO, made no important difference.

The remainder of the Exceptions submitted by the carriers/ILA essentially concern the Presiding Officer's finding that, were it not for "labor considerations," the Rules on Containers would violate the shipping statutes. They emphasize that every one of the statutes in issue requires that conduct must be unreasonable in order to be illegal, and that the Presiding Officer erred in disregarding labor considerations as part of his "reasonableness" analysis. They argue that labor

considerations may not be limited to the role of justifying offenses already found, on the ground that such an approach amounts to a per se analysis whereby all discrimination is unlawful. They further contend that the Rules are not unreasonable even if they are judged solely from a transportation standpoint, because the Rules' opponents have not proved specific harm and because the 50-mile zone allows shippers whom they describe as being truly in a position to benefit from intermodalism -- that is, LCL shippers outside the zone and FSL shippers who load and unload at their own facilities -- to do so. They state that it is not sufficient to show some adverse effects on NVO's, consolidators and warehousemen because the labor laws establish that impact on third parties of a valid collective bargaining agreement is irrelevant. They submit that even NVO's benefit from the Rules, because the labor accord represented by the Rules permitted containerization to flourish, without which NVO's could not do business; the carriers/ILA state that if the Commission invalidates the Rules, the union will assert its work preservation jurisdiction over all cargo passing over the piers, because no alternative to the Rules has been devised.

The carriers and the ILA apply similar arguments to sections 10(c)(1)-(2) of the 1984 Act, which they emphasize bar only "unreasonable" refusals to deal and restrictions on technological innovation. They also contend that they have not refused to deal at all, that the carriers are prepared

to accept all cargo brought to the piers in a manner consistent with the Rules. They further suggest that these sections of the 1984 Act may not apply to the carriers' implementation of the Rules, because concerted action to implement a collective bargaining agreement falls within the "maritime labor agreement" exemption of the MLAA.

b. International Association of NVOCC's/Florida Custom Brokers and Forwarders Association

These opponents of the Rules contend that the Rules are illegal because they allocate the total burden of alleviating the ILA's job losses from containerization on one small segment of the shipping public that benefits from containerization, i.e., NVO's and others within the 50-mile zone. They argue that the Presiding Officer erred in requiring that specific monetary damage must be shown to prove harm, and that they adduced sufficient evidence from which inferences of harm reasonably may be drawn. They further submit that the carriers and the ILA must justify any recognition of labor considerations by proving that the Rules actually have succeeded in returning work to the union, and that it is not sufficient for them simply to cite the existence of the collective bargaining agreement.

c. American Warehousemen's Association

The AWA argues that the Presiding Officer's standard of proof was too demanding, and that he was wrong to require that proof of injury must be as specific and convincing as if the Rules' opponents were seeking monetary damages from the carriers. The AWA further contends that the Presiding

Officer was wrong to state that the three warehouse operators who testified during the proceedings had little credibility because they allegedly had failed to comply with a discovery request for their financial statements; AWA states that the witnesses did in fact provide their 1980 and 1981 statements. It also states that none of the discovery requests from the carriers and the ILA asked the warehousemen to specify the nature or extent of any harm caused them by the Rules.

d. National Customs Brokers and Forwarders Association of America

The NCBFAA argues that the Commission has never held that, in an investigation instituted by the agency, actual monetary damages must be proven to support findings of violations of sections 16 and 17. It submits that the historical standard properly applicable here is that parties challenging discriminatory or preferential practices arising out of provisions in carrier tariffs need only show that the potential exists for unreasonable discrimination or preference. NCBFAA contends that it had no knowledge at the outset of the proceeding that it would be required to meet the Presiding Officer's stringent test of quantified commercial harm, and that he acted unfairly in imposing that standard.

With respect to the issue of labor considerations, NCBFAA argues that carrier practices must be justified only by transportation considerations, that it is a false and ultimately unworkable test to balance labor benefits against

transportation harm, and that further it is unfair to require essentially local businesses such as NVO's or freight forwarders to overcome a labor practice of coast-wide application on the basis of their own particular commercial damages.

e. American Trucking Associations

ATA argues that the opponents of the Rules adduced a prima facie case that the Rules are unreasonable, as the Presiding Officer acknowledged in the I.D. See I.D. at 60-61. It claims that the burden at that point should have shifted to the carriers and the ILA to show that the Rules were justified by transportation conditions or labor considerations. ATA contends that the Rules clearly are not justified by transportation conditions, and that the Presiding Officer's approach to weighing labor considerations was in error. It proposes a new test, whereby the benefits and burdens of the collective bargaining agreement to both sides are considered. This test would involve four parts:

1. The carriers/ILA would have to demonstrate that containerization in the port areas under investigation[47] has burdened or harmed the ILA through the loss of jobs or manhours;

2. The carriers/ILA would have to show that during January and February 1981, the period of record, the rules measurably benefitted the ILA by bringing cargo to the piers;

---

[47] Boston, New York, Baltimore, Hampton Roads/Norfolk, Charleston, Savannah, Jacksonville, Miami, Mobile, New Orleans, Houston and Galveston.

3. The Rules' opponents would then have to demonstrate that they were measurably harmed by the Rules in January and February 1981; and

4. The Rules' opponents would have to demonstrate that they have not disproportionately benefitted from containerization.

Under this test, ATA argues that the carriers/ILA failed to establish that containerization has harmed the ILA or that the Rules measurably benefitted the ILA during January and February 1981, that the Rules' opponents submitted both general and specific evidence of harm under the Rules, that persons within the 50-mile zone have not benefitted disproportionately from containerization and that the Rules therefore should be found unlawful.

f. Hearing Counsel

Like ATA, Hearing Counsel also argue that the benefits to the ILA of the Rules first must be established and then balanced against the evidence of harm to the Rules' opponents; Hearing Counsel adapt for this purpose the "benefits/burdens" test established for adjudicating complaints against non-uniform assessment agreements under the MLAA. They contend that the Presiding Officer's treatment of labor considerations was erroneous because he did not require the carriers/ILA to prove that the Rules have benefitted the ILA, and because he considered only evidence relating to the ILA's "worst case," New York, and failed to consider evidence that in other ports -- Baltimore, Charleston, Hampton Roads and Savannah -- ILA man-hours actually increased between 1967 and 1979. Hearing

Counsel submit that the standard of proof advocated by the Presiding Officer failed to allow adequately for the short two-month period of record and the failure of many carriers to establish methods of identifying containers of cargo affected by the Rules. They contend that under an appropriate standard of proof, substantial harm to shippers, truckers and warehousemen from the Rules has been established.

3. Replies to Exceptions

a. Carriers/ILA

In replying to the Exceptions submitted by the Rules' opponents (including Hearing Counsel), the carriers and the ILA defend the test fashioned by the Presiding Officer for balancing the work preservation interests of the longshoremen against the harm done to off-pier business enterprises. His adaption of the BSA labor exemption criteria, they state, was consistent with the District of Columbia Circuit's CONASA decision, which they characterize as barring any determination that would find the Rules unlawful based solely on transportation considerations. They oppose the MLAA "benefits/burdens" approach because they do not concede that the work preservation goals of the labor contract place a "burden" on cargo to which the Rules apply. They repeat their earlier assertion that the Rules reasonably restrict the benefits of container technology "to those situations where it performs a truly intermodal function." Reply to Exceptions at 12.

In response to the contention of the Rules' opponents that the carriers/ILA had failed to prove that longshoremen were harmed by containerization or that the Rules have been an effective remedy, they state:

> It hardly takes proof to establish that an innovation which increases productivity by 600% . . . causes a loss of jobs. More fundamentally, it is self-evident that, when a container is stuffed or stripped at an inland site, the work of stuffing or stripping that container is lost by longshoremen at the piers.
>
> The same truism disposes of proponents' contention that the Respondents must prove that the Rules bring work back to the piers. The Rules require that containers be stuffed or stripped by longshoremen. Each container that longshoremen stuff or strip means work for the longshoremen that they would not have had if the container were stuffed/stripped away from the piers.*/

---

*/ Proponents' juggling of statistics in an attempt to show that the Rules did not bring work back to the piers during the 1981 implementation disregards this simple fact.

Reply to Exceptions at 14.

The carriers/ILA continue to assert that the Rules' opponents had failed to show any harmful consequences to their businesses. They state that during the discovery process, only 30 companies made an initial claim of harm and subsequently failed to come forward with any probative documentation. They submit that the testimony from NVO's consisted mainly of a recitation of harm they inflicted on themselves by efforts to avoid on-pier handling -- such as leasing of containers -- and that many of the other services performed by NVO's could be performed separate from the actual loading of the container. They criticize the

testimony from freight forwarders that the Rules required them to pay for the cost of ILA handling, on the ground that the forwarders "never articulated what that cost meant to their businesses." Reply to Exceptions at 19. They argue that the evidence of two specific instances where warehousemen lost business because of the Rules was not credible or represented a unique situation not applicable elsewhere. They further contend that there is no evidence that the Rules will harm consolidators by causing shippers either to perform stuffing and stripping at their own facilities or to shift their patronage beyond the 50-mile limit. Finally, they state that there is no basis for the opponents' claim that they had no warning that they would be required to prove specific financial harm.

The carriers and the ILA acknowledge that the Presiding Officer never indicated in his Initial Decision how harm to off-pier enterprises should be balanced against the benefits to the union, which they state was "[c]onsistent with sound judicial practice" because it was unnecessary to his decision. Reply to Exceptions at 25. They also note that the Presiding Officer did not state what kind of injury from the Rules would have to be shown before his balancing test would be triggered. They suggest that such evidence should concern whether the Rules unreasonably reduced the off-pier enterprises' profits and whether any such effects were on an industry-wide scale.

b. National Customs Brokers and Forwarders Association of America

The Replies by the Rules' opponents to the protective Exceptions filed by the carriers and the ILA were very brief and need not be summarized here. The NCBFAA continues to insist that any test that involves the weighing of labor factors against shipping concerns is fatally flawed and that labor policy may not serve as an affirmative defense to shipping law violations. It argues that the MLAA assessment agreement "benefits/burdens" test advocated by Hearing Counsel and other parties involves the weighing of benefits to shippers of a particular service against the charge assessed against that service, and that that process is not adaptable to weighing shipping burdens against labor benefits.

IV. DISCUSSION

A. The Issue of "Labor Considerations"

The passage of the Maritime Labor Agreements Act in 1980 cleared away the confusion that had existed previously regarding the application of "labor considerations" in FMC adjudications. The MLAA drew a bright line between the labor laws and the shipping laws and enjoined the Commission to regulate practices within its jurisdiction under Shipping Act standards, even if those practices are related to a collective bargaining agreement. The only question remaining is whether any of the post-MLAA developments altered Congress' instructions to the FMC.

Clearly, the 1983-85 litigation under the labor laws, culminating in NLRB v. ILA(II), had no such effect. The NLRB administrative law judge specifically refused to weigh shipping law considerations in reviewing the Rules under the National Labor Relations Act. The Fourth Circuit and the Supreme Court both stated that effects of the Rules on persons outside the collective bargaining process -- which is the focus of this investigation -- are irrelevant to labor law analysis. Thus these decisions reinforced, in a sense, the methodology established by the MLAA. The NLRB, the labor agency, judged the Rules by labor law standards, and the FMC, the shipping agency, will judge the Rules by shipping law standards.[48]

The other development that must be considered is the District of Columbia Circuit's 1982 decision in CONASA. The carriers and the ILA have characterized the court's remand of the Commission's Sea-Land decision and its subsequent "Supplemental Opinion Following Remand" as follows:

> The court of appeals has clearly indicated what may not be done. National labor policy may not be disregarded in its entirety, nor may it be relegated to the status of an affirmative defense to the "indefensible." What must be done is clear from the court's refusal to countenance what the Commission had done. The shipping statutes outlaw unreasonable practices and unjust and undue discrimination. The Commission must take labor

---

[48] As previously noted, the relatively narrow focus of the decisions by the NLRB, the Fourth Circuit and the Supreme Court on the stripping and stuffing provisions of the Rules created no basis for according "labor considerations" to the other enforcement provisions, such as the denial of containers to consolidators.

> matters into account initially in deciding whether the practices prescribed by the collective bargaining agreement are in actuality unjust, unreasonable or undue.
>
> The court of appeals did not remand [Sea-Land] to have the Commission retrace its steps along a one-way street to a predetermined end. It mandated a genuine analysis in which the labor factors would be given more than mere lip service. These labor factors must be considered as an integral part of the equation. They have joined the ranks of traditional transportation considerations which in their aggregate and interplay determine reasonableness. They are not a license for unlawful practices, but rather important elements in determining whether these practices are just and reasonable so as not to be unlawful at all.

Respondents' Brief at 12 (attached to Respondents' Exceptions).

Even allowing for advocate's license, these characterizations are remarkable for their lack of foundation. The court's opinion did not "clearly indicate" any of the things the carriers and the ILA say it did. The Presiding Officer also interpreted the court's actions as an indication that it was "unhappy" with Sea-Land, but he candidly admitted that the court did not give "even the slightest hint" of the source of its putative unhappiness. I.D. at 33. It is far more reasonable to infer instead that the court wished to suspend any final conclusions regarding the lawfulness of the Rules under the shipping statutes until the less complex issue of their lawfulness under the labor laws had been resolved. Given the Rules' origin in a collective bargaining agreement, the logic of such a course of action is readily perceived. At the time of CONASA, the Rules were pending before the NLRB following the Supreme

Court's remand in NLRB v. ILA(I), and were not in effect as a result of the injunction obtained by the NLRB at the end of February 1981. It is sensible to surmise that the District of Columbia Circuit wanted the labor litigation to run its course before the Commission reached a final determination regarding the merits of the Rules, particularly since the result of the NLRB proceedings might have removed, in whole or in part, the necessity for any Commission decision.

In any event, it is incontestable that, as a matter of law, CONASA did not bind the Commission to any method of analysis or decisional result in either the Sea-Land proceeding or in this investigation. It also must be remembered that the District of Columbia Circuit did not have before it in CONASA the Commission's analysis of the MLAA's meaning and importance regarding the substantive role of labor considerations in Shipping Act adjudications. The Commission's Sea-Land decision was issued two years before the MLAA was enacted and the subsequent proceedings before the court were confined, by choice of CONASA and NYSA, to the statute's significance regarding questions of jurisdiction. By staying proceedings in Sea-Land until this investigation was completed, the court intended that the Commission's deliberations herein might "shed further light on the shipping law issues involved" in Sea-Land. 21 S.R.R. 1057, 1058. Our analysis of the MLAA set forth in this report is consistent with the court's purposes and reinforces the result of Sea-Land.

The Commission's conclusion that we should exclude labor considerations from our Shipping Act deliberations is supported by a number of truck and rail cases decided under the Interstate Commerce Act. In Galveston Truck Line Corporation v. Ada Motor Lines, Inc., 73 M.C.C. 617 (1957), Galveston Truck Line, which was not unionized, was requested by the Teamsters union to enter into a labor agreement. When Galveston refused, officials of the union advised unionized motor carriers in the Oklahoma City area that the union was striking Galveston and that they should not handle any of Galveston's cargo. Although the union did not immediately picket Galveston, Galveston was unable to induce any Oklahoma City motor carrier to accept its interline shipments for approximately a six-week period.

Galveston filed a complaint with the Interstate Commerce Commission ("ICC"), alleging that the Oklahoma City carriers were in violation of former section 216 of the Interstate Commerce Act, which required motor carriers to accept and transport all freight offered to them in accordance with their tariffs. In its decision, the ICC stated that a carrier's duty to accept and transport without discrimination all freight offered is almost "absolute" and may only be excused where the carrier is prevented from carrying out its duty by circumstances beyond its control. 73 M.C.C. at 626-27. The ICC observed that there were no strikes or picket lines that would have prevented the motor carriers from accepting Galveston's shipments.

The Oklahoma City carriers defended their refusal to serve Galveston on the grounds that, by acceding to the union's demands, they were able to avoid a strike that would have prevented them from serving other shippers. The ICC rejected this contention, stating:

> Certainly, it may not be assumed that any resistence [sic] on the part of defendants to becoming the media through which the objectives of the union were to be accomplished would have provoked a general strike against their entire operations. In any event, if common carriers should be confronted with this dilemma their obligation to continue to render service to all without undue discrimination must be regarded as paramount.

73 M.C.C. at 628. The ICC pointed out that to hold otherwise would "substitute for the regulation of interstate common carriers now vested in this Commission an indirect control by labor organizations." Id. at 629.

Other cases established that the obligation of common carriers to provide service for all indiscriminately was not removed by "hot cargo" clauses in collective bargaining agreements. E.g., United Brotherhood of Carpenters and Joiners of America v. NLRB, 357 U.S. 93, 109-111 (1958); Merchandise Warehouse Co. v. A.B.C. Freight Forwarding Corporation, 165 F.Supp. 67, 74-75 (S.D. Ind. 1958). Even "peaceful picket lines coupled with union contractual provisions acquiesced in by the carriers" has been held not to excuse the carriers' statutory obligations or to allow interference with the rights of persons not parties to a collective bargaining agreement. Pickup and Delivery Restrictions, California, Rail, 303 I.C.C. 579, 594 (1958).

A common carrier must do "everything in its power to fulfill its obligations to the public" and is excused only if it is "prevented from so doing by circumstances clearly beyond its control . . . ." Quality Drug Stores, Inc. v. Eastern Freight Ways, Inc., 123 M.C.C. 198, 202 (1975). Such circumstances do not include a collective bargaining agreement; the carrier instead must "insist upon contractual terms with the Union that will permit [it] to fulfill [its] duties" as a common carrier. Merchandise Warehouse Company, supra, 165 F.Supp. at 76.

The Presiding Officer acknowledged these decisions but held that the principles drawn from them "are either so general as to be virtually valueless or they are specific instances of particular conduct found unlawful under other statutes or law [sic] which are not really analogous to the Shipping Act." I.D. at 39. However, the lesson of these decisions is not that they involve statutes whose provisions precisely coincide with the Shipping Acts,[49] but that they consistently show that common carriers in other transportation modes have not been excused from their statutory obligations on the basis of collective bargaining agreements with their employees. The carriers and the ILA

---

[49] In fact, Galveston Truck found violations of the requirements in section 216(b) of the Interstate Commerce Act that carriers must observe just and reasonable practices, 73 M.C.C. at 630, similar to sections 17 and 18(a) of the 1916 Act and section 4 of the Intercoastal Act. Merchandise Warehouse Co. involved section 216(d), the original model for section 16 First of the 1916 Act and sections 10(b)(11)-(12) of the 1984 Act. 165 F.Supp. at 74.

have not cited a single case in which a common carrier was permitted to interpose its collective bargaining obligations between the public and its statutory duties. Moreover, as we shall discuss below, the Shipping Acts impose duties on carriers that can be characterized as "absolute" in the Galveston Truck sense. Galveston and the other cases show that a common carrier may not bargain away such duties in a labor agreement and then defend its actions on the grounds that it served a greater public interest by avoiding a strike and preserving "labor peace."

For similar reasons, we reject the arguments of the carriers and the ILA that their collective bargaining agreement and labor peace on the docks should be considered together with "traditional" transportation factors in determining whether the Rules are reasonable under the Shipping Acts. There is no basis in law or logic for equating a carrier's voluntary consent to a labor contract with its employees, whereby it agrees to place certain discriminations and burdens upon shippers and other persons, with recognized transportation conditions that can render an outwardly discriminatory or burdensome practice reasonable, such as peculiarities in the nature or transportation needs of the cargo, competition from other carriers, insufficient cargo to warrant direct service at a particular port, or conditions at a port or other facility that truly are beyond the carrier's control. E.g., Pacific Westbound Conference - Equalization and Absorption Rules and Practices, ___

F.M.C. ___, 22 S.R.R. 946 (1984); North Atlantic Mediterranean Freight Conference - Rates on Household Goods, 11 F.M.C. 202, 210 (1967); American Manufacturing Co. v. Director General, 77 I.C.C. 52 (1922). The Commission cannot agree to a methodology that would permit the carriers to bargain with the union without any incentive to safeguard their fundamental common carrier obligations. Notwithstanding the contrary arguments of the carriers and the ILA, the result indeed would be a license to the carriers for unlawful practices because, judging from their pleadings in this proceeding, such practices always would be shielded from Shipping Act remedies by the bulwark of "labor peace."

None of the other methods proposed by the Presiding Officer and the parties for incorporating labor factors into the Shipping Act are convincing or feasible. As we have stated, the general intention of the MLAA was that the Commission should return to its traditional role of interpreting the Shipping Acts, as applied to the persons and commercial activities covered by the Acts, and that the FMC should refrain from making findings of fact and conclusions of law about such labor matters as whether a particular item of agreement was a mandatory subject of collective bargaining. The Commission embarked upon that practice only as a result of Volkswagen, and each succeeding

case, BSA, NYSA and PMA, required detailed analysis from the FMC of labor law decisions and collective bargaining agreement provisions. By enacting the MLAA, Congress intended to put a halt to the process and to henceforth reserve labor law issues to the NLRB. The adoption by the Commission of any of the various tests proposed by the Presiding Officer and the parties would be contrary to the policies underlying the MLAA, because they would require us to return once again to making findings of fact regarding the collective bargaining process and to rendering interpretations of the National Labor Relations Act.

The Presiding Officer proposed that the BSA labor exemption criteria be revived. These criteria would require the Commission to make findings as to whether collective bargaining claimed to justify a carrier's practice "was in good faith over a matter of legitimate concern to the union and not tainted by a conspiracy between labor and management . . . ." I.D. at 44. This methodology obviously would involve the kinds of investigations that the Commission engaged in before the MLAA. A revival of BSA would conflict with the MLAA in that BSA concerned the extent of Commission jurisdiction over labor-related shipping activities, and Congress itself resolved that issue

when it enacted the MLAA.[50]

The Presiding Officer's specific application of the BSA test was seriously flawed on its own terms. He analyzed the Rules on Containers in a three-stage process:

> The inquiry almost has to begin with the question of whether the particular activity is, in fact, unreasonable, prejudicial or discriminatory. If it is, the next question becomes whether the activity is justified by any of the traditional transportation factors held to excuse the activity. If such factors are not present, then the activity can be found unreasonable, unduly prejudicial or unjustly discriminatory and violative of the Act, unless the activity is said to be excused by labor considerations, i.e., is the result of a collective bargaining agreement.

I.D. at 48 (emphasis in original).

The Presiding Officer found from the face of the Rules that they were, in fact, prejudicial and discriminatory. Next, he found that there were no transportation factors that justified the prejudice and discrimination.

---

[50] As we have discussed above, the carriers and the ILA previously argued in this proceeding that, even if the Rules on Containers fall within the MLAA's tariff provision, they nevertheless should be exempted from Commission jurisdiction under the BSA standards. In the February, 1982, Interim Report and Order, the Commission rejected that argument by applying the BSA criteria and finding that the Rules were ineligible for an exemption because they are imposed on outside parties. 21 S.R.R. 544, 556-57. While the carriers and the ILA did not raise any jurisdiction arguments in their Exceptions to the I.D., they indicate that they are reserving such arguments "for litigation at a later time." (Reply to Exceptions at 4, n. 4). That being the case, the Commission states here by way of clarification that, as Commissioner Moakley argued in his concurring opinion in the Interim Report, the MLAA nullified the BSA nonstatutory exemption and the jurisdictional inquiry ends once it is found that the Rules on Containers must be published in the carriers' tariffs and therefore fall within the MLAA's tariff matter provision. 21 S.R.R. at 563.

Accordingly, he concluded that the Rules would violate the Shipping Acts in a "traditional" Shipping Act case. However, at this point, the Presiding Officer departed from Shipping Act analysis in order to account for "labor considerations." He did so by transmuting the third BSA criterion, that the collective bargaining agreement should not impose its terms on outside parties, into a requirement that the NVO's and consolidators must prove that they have been harmed by the Rules and that if that burden is met, such harm must be weighed against the labor benefits brought about by the collective bargaining agreement.

The Presiding Officer acknowledged that he was proposing an unprecedented use of the third BSA criterion, i.e., that it be employed to determine the lawfulness of a practice under the substantive prohibitions of the Shipping Acts, "a purpose . . . somewhat different from its role in determining labor exemptions." I.D. at 45. However, he did not acknowledge that his interpretation of the criterion also was radically new. The evolution of that standard in both the antitrust labor exemption cases and the Commission's decisions consistently shows that whether a particular labor agreement met the standard's requirements turned only on the text of the agreement's provisions and not on the degree of actual harm (if any) suffered by outside parties. In NYSA, the Commission denied a labor exemption to the assessment agreement before it because carriers not members of NYSA were required, as a condition

of receiving terminal services at the Port of New York, to sign an agreement levying assessments in accordance with the assessment formula under investigation. There was no issue regarding the actual or potential economic harm suffered by non-member carriers as a result of the assessment agreement. Similarly, in PMA, there was no issue regarding the harm that would be suffered by non-member ports forced to comply with the various conditions for using PMA-ILWU joint hiring halls. Perhaps most significant, the application to the Rules on Containers of the third BSA criterion, in its traditional interpretation, already has been settled by the District of Columbia Circuit, which ruled in CONASA that the Rules are imposed on outside parties and were not eligible for a labor exemption. 672 F.2d at 187-88. Thus, the carriers and the ILA are incorrect to defend the Presiding Officer's test as consistent with CONASA. On the contrary, his test is directly inconsistent with CONASA.

The Presiding Officer was aware that his standard of proof with its emphasis on injury was at odds with Commission cases (discussed below) holding that in the absence of a claim for reparations, proof of harm is not a necessary element in a case of unjust discrimination or prejudice. But he dismissed the problem, stating:

> Whether harm is an essential element of the traditional case of discrimination where only transportation factors are involved is not the question presented here.

I.D. at 50. Instead, he recast the issue as follows:

> [T]he problem is whether harm can be an element of the labor policy considerations proffered in defense of practices challenged under the shipping laws. I am aware of no generally accepted tenet of law or of any precedent which would preclude its inclusion.

Id.

This method of analysis placed a greater burden on the NVO's and other persons opposed to the Rules than they would have borne in a "traditional" case of unjust discrimination or undue prejudice brought under the Shipping Acts. However, the Commission has concluded that this proceeding in fact must and should be adjudicated as a "traditional" case, based only on transportation factors. Because the Presiding Officer's test conflicts with both the will of Congress and with established court and Commission precedent, its adoption would be unwarranted and unfair to persons whom the maritime statutes seek to protect.

Hearing Counsel, joined by the American Trucking Associations, would have the Commission measure "labor benefits" by adopting the "benefits vs. burdens" test from proceedings involving assessment agreements under the MLAA. As applied by those parties, this test would require us to second-guess the inclusion of the Rules in the collective bargaining agreement by determining whether the decline in man-hours suffered by the ILA at particular ports in fact was caused primarily by containerization, or by other factors such as declining market shares. The test also would require the Commission to determine whether the Rules in fact have succeeded in returning work to the piers, by

measuring man-hours at various ports subsequent to the Rules' implementation. The Presiding Officer's test presumably also would have required the latter determination or something similar to it, although he did not reach that point in his analysis.

As with the BSA test, the adoption of this test would require the Commission to make findings of fact outside its area of expertise and to engage in investigations contrary to the policies of the MLAA. The application of the test in the area intended by Congress, i.e., in complaints against non-uniform assessment agreements, in contrast requires only findings under the Shipping Acts regarding the fairness of particular assessments against ports or cargoes. E.g., Boston Shipping Association v. FMC, 706 F.2d 1231 (1st Cir. 1983).

Finally, and perhaps most important, there are important policy considerations that militate against the Commission's attempting to weigh labor considerations. The cases and legislation summarized in this decision illustrate how the national policies and purposes underlying the Shipping Acts differ fundamentally from the policies underlying the National Labor Relations Act. As the District of Columbia Circuit said in CONASA, the labor laws "[do] not answer the questions the FMC is required to ask - do the Rules unduly discriminate against certain shippers, and are they unjust and unreasonable?" 672 F.2d at 181. The Supreme Court's decisions on the Rules made it clear

that any harmful effect on shippers and consolidators is irrelevant to the Rules' validity under the labor laws. In contrast, the Shipping Acts exist in large measure to protect shippers and other persons from unreasonable or discriminatory carrier practices.[51] The District of Columbia Circuit has described discriminatory tariffs as "a primary concern" of the Shipping Acts. Pacific Maritime Association v. FMC, 543 F.2d 395, 409. The Commission cannot provide prophylactic protection against labor-related tariffs such as the Rules by controlling or influencing the agreement-filing process because, as a result of the MLAA, we no longer have jurisdiction over the carriers' collective bargaining activities. The application of the Shipping Acts can come only after such practices are fait accompli. Given that fact, additional deference to labor policy by the Commission in its post-implementation application of the Shipping Acts to the Rules could well result, as Judge MacKinnon pointed out in CONASA, in the effective removal of any protection for shippers who are being forced to bear the costs of the carriers' concessions at the collective bargaining table. 672 F.2d at 191.

The elemental differences between the national policies represented by the Shipping Acts and the labor laws become starkly apparent when consideration is given to trying to do

---

51 "The primary purpose of the shipping laws administered by the FMC is to protect the shipping industry's customers, not members of the industry." Boston Shipping Association v. FMC, 706 F.2d at 1238.

what the Presiding Officer and the carriers/ILA avoided doing, that is, actually balance the labor benefits (however defined) brought about by the Rules against harm caused to shippers and other persons. In its Exceptions and Reply to Exceptions, NCBFAA advanced persuasive arguments that any comparison of labor benefits and Shipping Act harm is at bottom an illogical and intellectually untenable exercise. We find NCBFAA's analysis compelling, and adopt it as our own:

> The test requires Proponents to show measurable harm, that is, dollars and cents figures from their books and records. The ALJ offers no guidance whatsoever as to what figures must be offered to qualify as "measurable harm" nor does he suggest which Proponents or how many Proponents must offer such evidence. Most importantly, he does not state when or how under his test the harm demonstrated by Proponents will be sufficient to outweigh "labor policy . . . ." Exactly how many dollars of lost business or productivity or increased costs must be shown? And how many jobs must Respondents show were regained by the rules to be "balanced" against the dollar harm? Is the measure of proof of dollar loss the same for exporters as for importers? If Respondents must show a gain in employment, which they failed to do, is such gain to be measured against exporters' or importers' losses, or the losses of a port . . .? To these crucial questions, the test has no answer.

NCBFAA Exceptions at 21.

> Amidst the multitude of issues raised (but not resolved) by the test, there exist two essential unanswerable questions. First, what specific amount of harm is required to invalidate the Rules? Second, how can Proponents be expected to gather the evidence of actual adverse impact? An examination of several specific scenarios demonstrates the utterly impossible task the Commission will be required to perform if it adopts the ALJ's balance of interests test. Suppose a New York exporter, in response to the Rules on Containers, decides to mini-bridge its

clear that the National Labor Relations Act does not apply to the case before the Commission in either its terms or its underlying policies, there exists only, to borrow from conflicts of law terminology, a "false conflict" that the FMC is not obliged to resolve by attempting to blend the two bodies of law.[52] See United Brotherhood of Carpenters and Joiners of America v. NLRB, 357 U.S. 93, 109-111 (1958). For all the reasons set forth above, we are convinced that there is no reasonable or feasible methodology by which we can seek to accommodate "labor interests" without abandoning our fundamental Shipping Act obligations. The Rules on Containers, in their manifestation as common carrier tariffs, will be judged according to Shipping Act standards normally applicable to such tariffs.

Having so concluded, the Commission will apply labor factors in devising any sanctions against the Rules, under the guidance of Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962). In Burlington, the ICC found that a union-induced secondary boycott had caused serious inadequacies in the trucking services available in a particular area and accordingly granted operating authority to a new company. The Supreme Court remanded the case

---

[52] See Currie, Notes on Methods and Objectives in the Conflict of Laws, 1959 Duke L. J. 171. The author suggests that, in cases of "true conflicts" that cannot be resolved by restrained interpretations of the disaccordant statutes, the deciding forum should resolve the case before it by fully applying its own law and the underlying conflict, in a democracy, should be resolved through the political process and not by the courts. Id. at 176.

because the ICC had not justified adequately its choice of remedy and had given no explanation why available remedies other than a new service were not sufficient. The Court directed that in the remand proceedings, the ICC should be careful in its choice of remedy so as to avoid unnecessary disruption of the collective bargaining process and that the remedy chosen should be "precise and narrowly drawn . . . ." Id. at 173-74. The Commission will apply similar principles to its choice of remedy in this proceeding.

B. Application of the Shipping Acts to the Rules on Containers

Because the Commission has concluded that "labor considerations" should not affect our examination of the Rules on Containers, it may be useful at this point to recapitulate the essence of the Rules considered only as ocean carrier tariffs.

> [A] tariff is in essence a statement by the carrier to possible shippers that it will furnish certain services under certain conditions for a certain price and once it has become legally promulgated, it is binding upon both the carrier and any shipper taking advantage of it, and its terms (in essence) become in such respects the only contract between the two allowed by law . . . .

Union Pacific Railroad Co. v. Higgins, 223 F.Supp. 396, 401 (D.N.D. 1963).

The Commission has before it ocean common carrier tariffs that announce to shippers, consolidators, warehousemen and freight forwarders that all containers loaded with cargo (other than mail, used household goods or personal effects of military personnel) coming from or

destined to points within 50 miles of any ILA port along the Atlantic and Gulf Coasts must be loaded and unloaded in the first instance at pier facilities. Containers of export cargo arriving at the piers already loaded in contravention of this requirement must be stripped and restuffed by ILA members. Exceptions are made for those containers that hold solely (1) export cargo of a single manufacturer or other single shipper, but only if the cargo has been loaded by the shipper's employees at its own facility, or (2) import cargo owned by a single consignee, but only if such cargo is to be unloaded at the consignee's facilities by its own employees or stored in a public warehouse for 30 days at normal warehousing fees. The tariffs in addition deny the carriers' containers to any consolidator or deconsolidator, i.e., anyone loading or unloading for hire the cargo of more than one shipper or consignee into or out of a single container.

Consolidators are usually non-vessel-operating common carriers (NVO's). In addition, ocean freight forwarders and warehousemen often offer NVO services as part of an integrated full-service operation. NVO's gather the cargoes of shippers (usually exporters), accept legal responsibility for the cargo and issue bills of lading to the original shippers; thus, to the shippers it serves, an NVO is a common carrier. The NVO then ships the cargo in its own name with a vessel-operating ocean carrier; thus, the NVO is a shipper in its relation with the vessel operator. NVO

operations became widespread after the emergence of containerization and the development of certain related carrier practices. These practices included the carriers' making their containers freely available to NVO's, their payment of special consolidation allowances and their promulgation of Freight All Kinds ("FAK") rates. The FAK rate applies when the goods of more than one shipper are carried in one container as a single unit, and it results in a lower single rate on the whole than the total freight charges would have been on the individual shipments. The NVO's take their profit from the margin created by the FAK rate. The carriers encouraged the development of NVO's because they thereby obtained cargo from smaller shippers who otherwise might not be able to participate in maritime commerce. The benefits of NVO's to smaller shippers, carriers and the commerce of the United States has long been recognized by Congress, the courts and the Commission. S. Rep. No. 3, 98th Cong., 1st Sess. 20 (1983); CONASA, 672 F.2d at 188; Cancellation - Consolidation Allowance Rule, 20 F.M.C. 858, 867 (1978).

The following discussion concerns the application of sections 14 Fourth, 16 First, 17 and 18(a) of the 1916 Act, the corresponding sections of the 1984 Act,[53] and section 4

---

[53] Because they carry forward existing proscriptions from the 1916 Act, the application of these particular sections of the 1984 Act will not work a "manifest injustice" against the carriers or otherwise transgress the guidelines of Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974).

of the 1933 Act to the Rules on Containers provisions of the carriers' tariffs. The Commission does not decide herein the lawfulness under these statutes of carrier practices that may relate to or be consequences of the Rules, but that are not required by the Rules.[54] We decide only the lawfulness of the practices described in the Rules themselves.

At this juncture, some observations are in order regarding the testimony and other evidence brought forward by the off-pier enterprises that oppose the Rules. As we have noted, the Presiding Officer was critical of this

---

[54] For example, Richard W. Lee, former chief executive officer and director of Dolphin Forwarding, testified that when the longshoremen at the pier stripped and restuffed two Dolphin containers, they repacked the cargo into four containers. Tr. 4/19/83 at 146. Allie McNeil, of D.D. Jones, testified that a carrier was unable to protect temperature-sensitive cargoes from freezing during stripping and stuffing. Ex. 6 at 13.

To the extent that these practices may constitute violations of the Shipping Acts, there is no effective remedy in this proceeding. Civil penalties are not available because the Interim Report and Order, served February 5, 1982, removed the assessment of civil penalties as an issue. The remaining remedy of a cease and desist order would not apply, because the allegations described above have not been shown to be part of an ongoing pattern that could be addressed in such an order. The only effective remedy appears to be a claim for reparations. However, reparations are available only in a complaint case, not a Commission investigation. See Gillen's Sons Lighterage v. American Stevedores, 12 F.M.C. 325 (1969).

Thus, allegations such as those described above must be pursued in a complaint proceeding. On January 15, 1981, the International Association of NVOCC's and individual persons filed a complaint against a number of ocean carriers and employer organizations, alleging that the implementation of the Rules on Containers violated the 1916 Act and seeking $25 million in reparations. Docket No. 81-5, International Association of NVOCC's v. Atlantic Container Line. The case has been stayed pending completion of this proceeding.

evidence in his Initial Decision. However, it is clear that his analysis resulted from his conclusion of law that "labor considerations" required parties opposing the Rules to prove extensive and detailed financial harm. The Commission has found that the Presiding Officer erred, that "labor considerations" have no place in our adjudication and that any test requiring a balance of "labor considerations" against proof of financial harm is illogical, unworkable and unfair to persons affected by the Rules. Further, we discuss below extensive Commission precedent, acknowledged by the Presiding Officer, that in the absence of a claim for reparations, a showing of business harm is not necessary to a finding of unjust discrimination or unreasonable practices under the Shipping Acts.

Thus, the probative standard applied by the Presiding Officer was inappropriately harsh. Under the circumstances of this case, in which carriers publishing facially discriminatory and burdensome tariffs have not attempted to defend them by reference to transportation considerations, it is sufficient that the testimony supports and confirms the evidence provided by the text of the Rules themselves. The witnesses stated that they in fact were denied containers by the carriers, that they incurred additional costs as a result of stripping and restuffing of loaded containers, that business was lost to competitors outside the 50-mile zone and that their customers' shipments were delayed as a result of enforcement of the Rules. It was

unnecessary that a showing be made by off-pier enterprises that the operation of the Rules reduced their profits, curtailed investment or turned their entire industry into an economic failure, as the carriers and the ILA would require.[55] Imposition of such a requirement would be particularly unreasonable in light of the fact that the Rules' opponents were testifying in the spring of 1983 about effects on their businesses from the Rules' two-month implementation more than two years before. That factor does not excuse testimony that is otherwise lacking,[56] but it does illustrate the incongruity of demanding that the witnesses prove that the Rules would have ruined them financially. The Commission is not required to wait for such a state of affairs to take action, particularly since our role in this investigation is remedial, not punitive. Dart Containerline Co., Ltd. v. FMC, 639 F.2d 808, 817 (D.C. Cir. 1981); General Investigation of Pickup and Delivery Rates and Practices in Puerto Rico, 16 F.M.C. 344, 351 (1973); Investigation of Rates in the Hong Kong-United States Atlantic and Gulf Trade, 11 F.M.C. 168, 175 (1967).

It also should be stated that the breadth of the record in this proceeding clearly surpasses the evidence adduced in the Commission's Sea-Land investigation of the Rules as

---

[55] Reply to Exceptions at 26.

[56] For example, the witness for All Transport, Inc., an NVO and freight forwarder based in New York, appeared to lack personal knowledge regarding the impact of the Rules. 4/20/83 Tr. 20-70.

applied in the Puerto Rico trades, the sufficiency of which was not questioned by the District of Columbia Circuit in CONASA. The Commission's Sea-Land decision discussed testimony by three NVO's located in New York and San Juan. 21 F.M.C. at 24-25. This record contains evidence from NVO's (one of whom, Dolphin Forwarding, testified in Sea-Land), consolidators, warehousemen and freight forwarders operating in New York, Hampton Roads/Norfolk and Miami. Specific references to their testimony will be noted below where appropriate.

1. Section 14 Fourth

Section 14 Fourth of the 1916 Act prohibited a carrier from, inter alia, unfairly treating or unjustly discriminating against any "shipper" in the matter of "cargo space accommodations" or other "facilities." 46 U.S.C. app. § 813 (1982). That provision of section 14 Fourth was carried forward in section 10(b)(6)(C) of the 1984 Act, 46 U.S.C. app. § 1709(b)(6)(C), with one substantive change. Section 10(b)(6)(C) deletes the limiting words "against any shipper" from the prohibition. The carriers and the ILA argue strenuously that truckers, freight forwarders, warehousemen and customs brokers were not protected under the 1916 Act because they are not "shippers." It is not necessary to resolve that issue here, since reparations are not in issue and the only remedy is a cease and desist order against current practices. We must decide only the general applicability of these particular statutes to the Rules on Containers.

The Rules do not address "cargo space accommodations." However, Rule 1(E), pursuant to the "Dublin Supplement," requires the denial of containers to NVO's and other consolidators. The term "facilities" as used in sections 14 Fourth and 10(b)(6)(C) includes containers.[57] However, the carriers and the ILA argue that even if sections 14 Fourth and 10(b)(6)(C) apply to the denial of containers, there is no violation because the statutes do not protect NVO's against this practice. They concede that an NVO may be a shipper in relation to the underlying carrier, but contend that whether an NVO can be considered a "shipper" for purposes of sections 14 Fourth and 10(b)(6)(C) depends on the interest for which it seeks the container. They argue that when an NVO's interest in obtaining a container is for the purpose of loading or unloading cargo for hire, the NVO is not a "shipper" for purposes of the Shipping Acts. No authority is cited for this proposition.

An NVO is no less a shipper in its relationship with the underlying carrier because it is in the business of providing ocean transportation to its own customers. See ICC v. Delaware, Lackawanna & Western Railroad Company, 220 U.S. 235 (1911). This historical principle was approved and carried forward by Congress in defining "non-vessel-operating common carrier" in the 1984 Act. Section 3, 46

---

[57] The Commission so observed in Sea-Land, supra, 21 F.M.C. at 28. The ILA's own characterization of containers as extensions of the ship's hold would compel the conclusion that containers are cargo facilities.

U.S.C. app. § 1702(17), states that an NVO "is a shipper in its relationship with an ocean common carrier." In explaining the inclusion of this provision, the Senate Report stated:

> The shipper status of an NVO, in its relationship with the vessel operator, is intended to accord to NVOs the same protection as is accorded other shippers, such as the prohibition against unjust discrimination.

S. Rep. No. 3, 98th Cong., 1st Sess. 20 (1983). Clearly, an NVO is acting as a shipper in requesting a container from a vessel-operating carrier in order to load and tender the container. It is the relationship between shipper (NVO) and carrier that is evidenced by this transaction and the NVO is entitled, just as any other shipper, to the protection of both sections 14 Fourth and 10(b)(6)(C) in this capacity.

The change brought about by section 10(b)(6)(C) of the 1984 Act would appear to strengthen the argument that persons other than shippers may not be unfairly denied containers. The deletion of the specific limiting words during the legislative process[58] must be presumed to have been deliberate and meaningful.[59]

While we need not decide in this case the outer limits of the group entitled to protection under section

---

[58] Compare S. 47, 98th Cong., 1st Sess. § 12(b)(6) (Mar. 1, 1983) (section 14 Fourth limitation to "shippers" retained) with H.R. 1878, 98th Cong., 1st Sess. § 9(b)(6) (Oct. 17, 1983) (limitation to "shippers" deleted). See H.R. Rep. No. 600, 98th Cong., 2d Sess. 40 (1984) (conference adopts House version).

[59] See Sutherland Stat. Const. § 22.30 (4th Ed.).

10(b)(6)(C), it seems clear that such protection extends at least to those entities seeking containers on behalf of shippers. Thus, truckers, warehousemen, freight forwarders, customs brokers and non-NVO consolidators may not be unjustly discriminated against in the matter of cargo space accommodations or other facilities, to the extent that they are seeking and utilizing such accommodations or facilities as or on behalf of members of the shipping public. This relationship with common carriers is regulated by the 1984 Act.

The Rules deny containers, a cargo facility, to only one particular class of persons solely on the basis of the kind of work those people do (in which they compete with the ILA membership for cargo loading work). Because this denial is not based on transportation needs or conditions properly cognizable under the Shipping Acts, the Commission holds that this practice is unfair treatment and unjust discrimination against at least NVO's, in violation of section 14 Fourth of the 1916 Act, and against NVO's and others acting as or on behalf of shippers, in violation of section 10(b)(6)(C) of the 1984 Act.

As discussed below in connection with section 16 First, there is no need to find that NVO's and consolidators being denied containers are in competition with those receiving them, or that those being denied containers are suffering business harm requiring reparations. See Flota Mercante Grancolombiana v. FMC, 302 F.2d 887 (D.C. Cir. 1962); United

States Atlantic and Gulf-Puerto Rico Conference v. American Union Transport, Inc., 5 F.M.B. 171 (1956). The record here shows the existence and operation of facially unfair and discriminatory tariff provisions, which have not been defended or justified on the basis of transportation requirements or circumstances. That alone provides sufficient grounds for FMC action. In addition, there is testimony from consolidators and NVO's confirming that, in the two months the Rules were in effect during the period of record, they in fact were refused containers and thereby incurred increased costs and lost customers.[60]

2. Section 16 First

Section 16 First of the 1916 Act prohibited a carrier from subjecting "any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . . ." 46 U.S.C. app. § 815 (1982). This provision has been carried forward in section 10(b)(12) of the Shipping Act of 1984, 46 U.S.C. app. § 1709(b)(12), which also outlaws "unreasonable refusals to deal." Id. The protections of the 1916 statute, being not limited to "shippers," extended more broadly than those of section 14 Fourth, and would cover, for example, warehousemen as well as NVO's.

In order to establish a violation of section 16 First in cases involving cargo rates, it is necessary to prove

---

[60] E.g., Ex. 5 (Dolphin Forwarding); Ex. 6 (D.D. Jones Transfer & Warehouse Co.); Ex. 7 (Norfolk Warehouse Co.).

that the person, locality or description of traffic allegedly being subjected to a prejudicial or disadvantageous rate is "similarly situated" in transportation terms to persons, localities or descriptions of traffic who are not receiving such treatment. Alternatively, where the carrier is charging different rates on different commodities or for transportation between different points, the "similarly situated" desideratum usually translates into a requirement that the allegedly prejudiced person must be shown to be in competition with someone who uses the carrier's service but who is not receiving such treatment. E.g., Assessment of Incheon Arbitrary - United States Import/Export Trades, 21 F.M.C. 522, 524-25 (1978).

However, in cases involving not rates but a tariff provision or practice or an across-the-board fixed charge that applies on all cargo regardless of the commodity involved, the Commission consistently has not required a showing of a competitive relationship between the party alleging prejudice or discrimination and an allegedly preferred person.

For example, in Valley Evaporating Co. v. Grace Line, Inc., 14 F.M.C. 16 (1970), as part of a tariff simplification program, a conference of carriers eliminated commodity rates for all commodities not meeting a specific volume requirement. In doing so, it inadvertently eliminated a commodity rate on dehydrated apples that were

> cargo to the West Coast paying $350 more per shipment than an all water route available from the Port of New York. How can Proponents possibly canvass all mini-bridge exporters to develop this evidence for use in this proceeding?
>
> In the case of importers who are forced under the Rules to keep their cargo at a public warehouse for 30 days, how can Proponents gather evidence of the total increased interest cost incurred? In truth, it is virtually impossible for Proponents, even if they had had notice of the existence of a balance of interests test, to obtain any total dollars and cents figures on harm. Even if they could, what is the proper test period? Is it the all too short two months involved herein, or should it be a year or more?
>
> Suppose, however, that Proponents accomplish the impossible. Assume that Proponents could affirmatively establish that the Rules result in overall damage to United States East and Gulf Coast shipping amounting to $250,000,000 over a one-year period. Will such a showing outweigh the purported labor justifications (which Respondents never articulated in this docket)? Assuming that the ILA can demonstrate that it gained, say, 500 longshore jobs along the coast from Maine to Texas, would these extra longshoremen "outweigh" damages of $250,000,000? Or, should the figure be 1,000 or 5,000 new ILA jobs? How can the Commission ever hope to compare apples and oranges?
>
> Suppose the port of New York could establish dollar harm that in some way outweighs labor gains, but the port of Savannah could not. Would the ALJ's balance of interest test result in a finding that the Rules are unlawful in New York but lawful in Savannah? The ALJ's test does not, and indeed, cannot provide an answer. Adoption of any type of test which requires the Commission to compare inherently unlike factors, such as labor gains against shipping losses, is totally unworkable. And it is not enough merely to say that the test has been inaccurately applied. <u>It is the test itself which is fundamentally flawed.</u>

Reply to Exceptions at 11-13 (emphasis in original).

It is fundamental that the Commission always should attempt to reconcile conflicting federal statutes in a manner that gives effect to both. However, because it is

moving in sufficient quantities to be entitled to a commodity rate under the conference criteria. A shipper who was assessed the higher "Cargo N.O.S." rate for a shipment of dehydrated apples brought a complaint before the Commission alleging a violation of section 16 First. The complainant did not introduce any evidence that it competed with any other shippers, nor did it introduce any evidence regarding the extent to which its ability to compete was harmed by the conference's action. The Commission concluded that once the conference had established the volume criterion for the elimination of commodity rates, it was required to apply it "in a totally fair and impartial manner." Id. at 22. The Commission went on to state:

> At this point the single question involved was whether a given commodity moved in sufficient volume or not. Questions as to the characteristics inherent in the particular commodity involved were irrelevant as were questions of whether the particular commodity competed with any other commodity. Thus, as we stated in Investigation of Free Time Practices--Port of San Diego, 9 F.M.C. 525, 547 (1966), the equality of treatment required in situations of this kind is "absolute and not conditioned on such things as competition."

Id.

In connection with the issue of damages, the Valley Evaporating respondents pointed out that complainant's only showing of injury was that it paid more dollars for the transportation of dehydrated apples than it would have if the commodity rate had applied. The Commission acknowledged that

> the existence of a "competitive relationship" between the preferred and the prejudiced shipper is an essential element of a violation involving alleged preferential or prejudicial rates or charges, [and] any award of reparation premised on such violation must take into consideration the "character, intensity, and effect" of this competitive relationship.
>
> * * *
>
> As we explained in Agreement No. 8905--Port of Seattle and Alaska S.S. Co., 7 F.M.C. 792, 800 (1964), a case involving alleged "unlawful discrimination and prejudice" in tariff charges, "Past decisions of the Commission and its predecessors make clear that the person claiming illegal prejudice or disadvantage must establish damage with respect to its ability to compete."

14 F.M.C. at 24 (emphasis in original). Nevertheless, the Commission found that this requirement should not apply where the carrier's duty to treat shippers equally was "absolute":

> However, we have already determined that the equality of treatment required here in this case is "absolute" and not conditioned on competition. Therefore, the "character, intensity, and effect" of competition becomes irrelevant and the measure of damages simply becomes the difference between the rate charged and collected and the rate which would have applied but for the unlawful discrimination or prejudice.

Id. at 25.

A second case illustrating the same principle is Free Time Practices - Port of San Diego, 9 F.M.C. 525 (1966). The Commission there concluded that no competitive relationship among shippers need be shown because the provision of free port time for the loading or unloading of cargo bore no relationship to the character of the cargo - "it is extended to cargo on equal terms without regard to

size, shape or any other characteristic inherent in the particular cargo involved." 9 F.M.C. at 547. The Commission went on to state:

> The equality required in situations of this kind is absolute and is not conditioned on such things as competition, proximate cause and the like.

Id. See also New York Foreign Freight Forwarders & Brokers Ass'n v. FMC, 337 F.2d 289, 299 (2d Cir. 1964), cert. den., 380 U.S. 910 (1965); International Trade & Development, Inc. v. Sentinel Line, 22 F.M.C. 231 (1979).

After acknowledging the principles established by these cases, the Presiding Officer correctly found that the application of the Rules on Containers applies generally and bears no relation to the character of the cargo itself. I.D. at 60. Thus, the presence or absence of competition between persons inside the zone, or between those inside the zone and those outside it, is irrelevant. In this connection, the Supreme Court's decision in Volkswagen provides additional support for the conclusion that the issues presented by the Rules on Containers do not require a showing of competition. 390 U.S. at 279-80, 293-94.

Once the complaining party makes out a prima facie case, it is up to the carrier to show that the prejudice is justified by some bona fide transportation requirement or condition. North Atlantic Mediterranean Freight Conference - Rates on Household Goods, 11 F.M.C. 202, 209-10 (1967), modified on other grounds sub nom. American Export Isbrandtsen Lines, Inc. v. FMC, 409 F.2d 1258 (D.C. Cir. 1969).

The Rules permit all shippers and consignees located outside the 50-mile zone to have their cargo loading and unloading work performed by off-pier consolidation, warehousing and NVO companies, if they wish, without stuffing and stripping of their containers at the pier. However, inside the zone, employment of such companies by a shipper or consignee is conditioned upon the requirement that the cargo must be loaded into or unloaded out of the container only at the pier by ILA longshoremen; at least with respect to export cargo, this requirement is backed up by the threat of stripping and restuffing of any container arriving at the pier already loaded.

The Rules permit "qualified shippers" and "qualified consignees" within the 50-mile zone to avoid stripping and stuffing at the pier. However, in order to be "qualified," a shipper or consignee must have a "proprietary interest" in the cargo (other than in its transportation or physical consolidation or deconsolidation), and the loading or unloading must be done only at its own facility and only by its own employees. A shipper loading cargo within the 50-mile zone who does not have a "proprietary interest" in the cargo, i.e., an NVO, cannot avoid stripping and stuffing at the pier. A shipper or consignee within the zone who does have a "propriety interest" in the cargo but who nevertheless is too small to have its own cargo facility and employees is denied the option of contracting such work to off-pier warehouses or deconsolidators and must use pier

facilities (consignees are permitted the option of paying for 30 days of storage in a public warehouse).

These various distinctions drawn by the Rules between persons inside and outside the zone, between owners of cargo and NVO's, between owners who have their own cargo facilities and those who do not and between importers who have a "warehouse exception" and exporters who do not have no relation to the type of cargo being moved and are not caused or justified by transportation circumstances or conditions. The Commission wishes particularly to address the differing treatment accorded to owners of cargo and NVO's. The Supreme Court's decision in ICC v. Delaware, Lackawanna & Western Railroad Company, supra, leaves no doubt that the mere ownership or non-ownership of cargo is not a transportation circumstance that can justify discrimination, preference or prejudice. Although ICC v. Delaware, Lackawanna was decided over seventy-five years ago, it is particularly relevant to the instant proceeding because it involved a company that was performing consolidation services much as NVO's do today.

In the 1870's and 1880's, railroads established a practice, similar to the ocean carriers' FAK rate, of charging less per unit of measure for carload shipments than for less-than-carload shipments. Entities known as forwarding agents (forwarders) began aggregating less-than-carload shipments tendered by various shippers in order to obtain the lower carload rates offered by the railroads.

220 U.S. at 243-44. However, in 1899, railroads serving the "Official Classification" territory[61] began restricting the forwarders' ability to obtain a carload rate by combining different shipments in the same car. The restrictions were as follows:

> "Rule 5-B. In order to entitle a shipment to the carload rate, the quantity of freight requisite under the rules to secure such carload rate must be delivered at one receiving station, in one day, by one consignor, consigned to one consignee and destination, except that when freight is loaded in cars by consignor it will be subject to the car-service rules and charges of the forwarding railroad. (See note.)
>
> * * *
>
> "Note. Rule 5-B will apply only when the consignor or consignee is the actual owner of the property.
>
> "Rule 15-E. Shipments of property combined into packages by forwarding agents claiming to act as consignors will only be accepted when the names of individual consignors and final consignees, as well as the character and contents of each package, are declared to the forwarding railroad agent, and such property will be waybilled as separate shipments and freight charged accordingly. (See note.)
>
> "Note. The term 'forwarding agents' referred to in this rule shall be construed to mean agents of actual consignors of the property, or any party interested in the combination of [L.]C.L. shipments of articles from several consignors at point of origin."

Id. at 246.

A complaint was filed with the ICC in 1907 by a forwarder who was charged a less-than-carload rate for

---

[61] The "Official Classification" territory encompassed the northeast part of the United States and extended west as far as Chicago.

merchandise belonging to several shippers that had been aggregated into three carloads. The ICC concluded that the railroads could not refuse to make carload rates available to forwarders while making them available to owners of the cargo. The railroads were ordered to cease and desist from applying the restrictions. A circuit court set aside the order and the ICC appealed to the Supreme Court. The Supreme Court upheld the ICC's decision, stating:

> The contention that a carrier . . . can make the mere ownership of the goods the test of the duty to carry, or, what is equivalent, may discriminate in fixing the charge for carriage, not upon any difference inhering in the goods or in the cost of the service rendered in transporting them, but upon the mere circumstance that the shipper is or is not the real owner of the goods is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the rights of shippers as to demonstrate the unsoundness of the proposition by its mere statement. We say this because it is impossible to conceive of any rational theory by which such a right could be justified consistently either with the duty of the carrier to transport or of the right of a shipper to demand transportation.

220 U.S. at 252 (emphasis supplied). The principles enunciated in ICC v. Delaware, Lackawanna have remained fundamental transportation law over the subsequent 75 years. E.g., American Trucking Associations, Inc. v. Atchison, Topeka, & Santa Fe Railway Co., 387 U.S. 397, 406, 407 (1967); Chicago, Milwaukee, St. Paul & Pacific Railroad Co. v. Acme Fast Freight, Inc., 336 U.S. 465, 476 (1949); DHL Corporation v. CAB, 659 F.2d 941, 946, n. 12 (9th Cir. 1981).

In sum, the Rules on Containers place restrictions on the ability of defined classes of shippers to utilize the full range of services offered by off-pier NVO's, consolidators, warehousemen and freight forwarders. These restrictions are not justified by transportation circumstances properly cognizable under the Shipping Acts and are arbitrary and unfair. The Commission holds that the Rules create unreasonable disadvantages to shippers within the 50-mile zone who wish to employ off-pier cargo facilities and to the companies operating such facilities, in violation of sections 16 First of the 1916 Act and section 10(b)(12) of the 1984 Act.

As was the case in ICC v. Delaware, Lackawanna, supra, the undue preference and prejudice is established from the text of the Rules themselves and no extrinsic evidence is required. In the absence of a claim for reparations, the extent of damage to the disadvantaged persons' revenues, profits or ability to compete is irrelevant. Nevertheless, the record shows beyond question that persons affected by the Rules suffered increased costs as a result of having to pay ILA labor charges that they otherwise would have avoided.[62] Southgate Trucking, a warehouse operator located within 50 miles of Hampton Roads, lost an account it had with Union Carbide when the Rules went into effect. Union Carbide transferred its business to a competitor of

---

[62] 4/19/83 Tr. at 86-96; Ex. 4; 4/19/83 Tr. at 109-10.

Southgate located outside the zone. When the Rules were enjoined at the end of February, 1981, Union Carbide returned to Southgate.[63] D.D. Jones Transfer and Warehouse Company, another warehouser/consolidator located within 50 miles of Hampton Roads, testified that some of its shipper customers delayed their shipments until after the Rules were enjoined. The carriers/ILA denounce such testimony as speculative and atypical (because the cargo allegedly was susceptible to moving through Richmond, a non-ILA port), but the testimony illustrates how the Rules place artificial restrictions on the free movement of cargo, on the ability of shippers to choose between pier-side versus off-pier cargo handling and on competition between off-pier enterprises.

For the same reasons, sections 16 First and 10(b)(12) interdict the provision in the Rules forbidding carriers from making containers available off-pier to NVO's and other consolidators. NVO's are being denied containers, not on the basis of any Shipping Act transportation circumstances, but solely on the basis of their identity as consolidators or deconsolidators, while no such prohibition is brought to bear against "qualified shippers."

---

[63] Ex. 10, p. 8; 4/21/83 Tr. 15-17.

3. Sections 17, second paragraph, and 18(a)[64]

In Free Time Practices - Port of San Diego, supra, the Commission stated:

> Section 17 [second paragraph] requires that the practices [relating to or connected with receiving, handling, storing, or delivering property] be just and reasonable. "Reasonable" may mean or imply "just, proper," "ordinary or usual," "not immoderate or excessive," "equitable," or "fit and appropriate to the end in view." Black's Law Dictionary, Fourth Edition. It is by application to the particular situation or subject matter that words such as "reasonable" take on concrete and specific meaning.
>
> * * *
>
> The justness or reasonableness of a practice is not necessarily dependent upon the existence of actual preference, prejudice or discrimination. It may cause none of these but still be unreasonable. To conclude otherwise is to make the second portion of Section 17 merely redundant of other sections of the Shipping Act, a result not readily ascribed to Congress.

9 F.M.C. at 547. The provisions of section 17, second paragraph, 46 U.S.C. § 816 (1982), have been carried forward without substantive change in section 10(d)(1) of the 1984 Act, 46 U.S.C. app. § 1709(d)(1). As the quotation above indicates, section 17 requires a flexible interpretation, and this is particularly appropriate given the unique

---

[64] Section 17, first paragraph, pertained only to the actual rates, fares and charges of carriers . Hearing Counsel contend that the Rules violate this statute because they effectively deny FAK rates to certain shippers and cargoes. Such circumstances could be a result of the operation of the Rules, but are not mandated by the text of the Rules themselves. As with the testimony mentioned in note 54, supra, such allegations are more appropriately the subject of a complaint proceeding. The Commission makes no findings regarding section 17, first paragraph, in this proceeding.

circumstances presented by the Rules on Containers. See Volkswagen, supra. While it is not necessary to prove discrimination or preference in order to find a violation of section 17 (as the quotation above indicates), a practice that is unjustly discriminatory or preferential ineluctably will be unreasonable as well. See, e.g., Perry's Crane Service v. Port of Houston Authority, 19 F.M.C. 548 (1977).

Section 18(a) of the 1916 Act imposes a "just and reasonable" standard on the practices of carriers operating in the domestic offshore trades, 46 U.S.C. app. § 817(a) (1982). A similar requirement applies through the provisions of sections 4 and 5 of the Intercoastal Act, 46 U.S.C. app. §§ 845a, 845b.

Because the Rules are unreasonably disadvantageous to certain classes of shippers and consignees and to off-pier enterprises that serve such shippers, in violation of sections 16 First and 10(b)(12), they are unreasonable under these statutes as well. In addition, certain provisions of the Rules should be analyzed more specifically here. In Sea-Land, the Commission found that the stripping and restuffing of loaded containers was unreasonable under section 18(a) of the 1916 Act and section 4 of the Intercoastal Act.[65] That enforcement mechanism is not based on or justified by any transportation need. No extrinsic

---

[65] Section 17 was not part of Sea-Land because the statute applied only in foreign commerce and Sea-Land involved only the Puerto Rican domestic offshore trades.

evidence regarding actual harm is necessary. See United States Lines, Inc. v. Maryland Port Administration, ___ F.M.C. ___, 20 S.R.R. 646, 649 (1980) ("[t]here is no legal precedent or logical premise for the notion that otherwise unreasonable tariff provisions are permissible if a user subjects itself to them and is making a profit in spite of their existence . . . . [T]he validity of the tariff must be adjudged as applied to any user, not merely on the basis of . . . particular parties' financial circumstances.").

Shippers having a "proprietary interest" in the cargo are excepted from having their cargo loaded or unloaded at the piers. As discussed above in connection with section 16 First, distinctions between shippers based on ownership of cargo are inconsistent with traditional common carrier obligations. The exception for "qualified" shippers placed the entire commercial burden imposed by the Rules on a single class of shippers within the 50-mile zone -- the NVO's - and is unreasonable. See Volkswagen, supra, 390 U.S. at 281-82. The argument advanced by the carriers and the ILA that consolidators within the zone should bear the burden of the Rules because they were responsible for displacing traditional ILA work may be a defense under the labor laws, but certainly is not under the Shipping Acts.

The prohibition against the furnishing of containers by carriers to all consolidators can be analyzed in similar fashion. The prohibition is intended to force cargo shipped by NVO's to be loaded or unloaded at the pier. Similar to

the exception for shippers having a proprietary interest in the cargo, this prohibition is based on the identity of the shipper, which, under the Shipping Acts, is not a reasonable basis for discrimination. It is also clear that this particular provision of the Rules is the result of the union using the carriers as weapons against its competitors. Such motives cannot justify the cessation by the carriers of their longstanding practice of making their containers freely available to consolidators.

Finally, the Rules require that inbound cargo not destined to a consignee that (a) owns the cargo and (b) operates its own warehouse must be stripped at the piers unless it is stored at a public warehouse for 30 days prior to delivery. These requirements, which impose additional expense and delay on import cargo, are not necessitated by transportation conditions and are therefore unreasonable.[66] It also was unreasonable and discriminatory for the carriers to maintain a "warehouse exception" for import cargo but not for export cargo; as discussed in Part I, supra, the "warehouse exception" for export cargo was eliminated in 1975 in order to placate the ILA.

In sum, for the reasons set forth above, we find that these provisions of the Rules are excessive and

---

[66] E.g., Ex. 144 at 23-24, 27-29. The carriers respond by claiming that the importer could avoid any hardship by having his cargo stripped at the pier and delivered loose to him. Why should he, if he did not, for whatever commercial or economic reason, choose that method in the first place?

unreasonable, and violative of sections 17 and 18(a) of the 1916 Act, section 4 of the Intercoastal Act and section 10(d)(1) of the 1984 Act.

4. Sections 10(c)(1)-(2) of the 1984 Act

Section 10(c)(1) of the 1984 Act bars concerted activity among two or more common carriers that results in "an unreasonable refusal to deal"; section 10(c)(2) bars similar activity "that unreasonably restricts the use of intermodal services or technological innovations . . . ." 46 U.S.C. app. § 1709(c)(1)-(2). Section 10(c) was drafted to preserve the prohibitions of section 15 of the 1916 Act, 46 U.S.C. app. § 814 (1982), against those activities that were considered abuses of concerted power. H.R. Rep. No. 53 (Part 1), 98th Cong., 1st Sess. 23-24 (1983); S. Rep. No. 3, 98th Cong., 1st Sess. 34-37 (1983). Because section 15, as previously enacted, is no longer in effect, Congress enacted section 10(c) to codify and provide additional protection against abuses of concerted power previously provided through case law under the more general "public interest," "detrimental to commerce" and "unjust discrimination" standards of section 15.

Unlike the other sections of the 1984 Act already discussed, sections 10(c)(1)-(2) have no antecedent in the 1916 Act provisions originally put in issue in this proceeding by the Commission's February 3, 1981, Order of Investigation. Section 15 was not included by that Order as one of the statutes possibly violated by the Rules on

Containers. Under the circumstances, any finding now against the respondent carriers under sections 10(c)(1)-(2) might transgress the carriers' due process rights to clear notice regarding the scope of the Commission's investigation.

V. CONCLUSION

The Commission long has recognized that the shipping laws of the United States should be interpreted so as to enable shippers to take full advantage of improved transportation techniques and services. Nearly a decade ago, the development of "landbridge" intermodal services, whereby shippers were offered a rail-water alternative to all-water service, was challenged by certain regional port interests. In denying the ports' complaint, the Commission stated:

> It would strain the interpretation of the Shipping Acts beyond credulity to conclude that they require the Federal Maritime Commission to destroy and prevent a significantly innovative development in the maritime commerce of the United States which redounds to the benefit of the shipper. * * * The public interest and the economy as a whole is enhanced anytime the public is offered an additional service which it may or may not utilize at its own discretion.
>
> The tide of events by which new and efficient operating modes come into existence cannot be held back by the dead hand of outmoded conventions. * * * The public interest cannot be perverted by precluding the utilization of more economically efficient and effective transportation modes and services.

Board of Commissioners of the Port of New Orleans v. Seatrain International, S.A., 21 F.M.C. 147, 183 (1978) (footnotes omitted).

We now are asked to leave undisturbed tariff provisions that preclude certain shippers from fully utilizing off-pier containerization and consolidation services and require them to bring their cargo to the piers, as in the past, for loading and unloading by longshoremen. These artificial restrictions on containerization and intermodalism are defended by resort to the post hoc rationalization that they do not affect shippers who can "truly benefit" from such services. The Commission cannot accept this argument. In enacting the Shipping Act of 1984, Congress mandated that the new statute should be administered in a manner that "provide[s] an efficient and economic transportation system in the ocean commerce of the United States . . . ." 46 U.S.C. app. § 1701. Further, the legislative history of the 1984 Act demonstrates that Congress was keenly aware of the need to achieve all possible benefits of containerization, which depend upon the uninterrupted transport of a container between shipper and consignee. The Senate Report stated:

> In the late 1960's, the technical innovation of containerization made possible new economies of scale and thus promised the potential for substantial reductions in real costs to vessel operators and shippers. As a consequence, containerization became rapidly established on the most important U.S. trade routes. The full benefits of containerization can only be realized, however, when a container moves between shipper and consignee or between inland consolidation centers without breaking bulk. Under these circumstances, additional economies are derived from the speed with which intermodal transfer takes place, from savings in the labor and "storage" costs associated with this process, and from cost reductions in packaging and insurance as well as substantial reduction in damage and pilferage claims.

S. Rep. No. 3, 98th Cong., 1st Sess. 10 (1983) (footnote omitted).

If a particular shipper cannot take full advantage of the benefits of containerization, that must result from the economies of his particular business and location in the marketplace. It should not result from the provisions of agreements between the carriers and their employees that preclude entire classes of shippers from fully utilizing containerization. Shippers must be allowed a free choice among different methods of transportation, so that they can discover for themselves whether off-pier container loading will result in cost savings and efficiencies of service. By preventing certain shippers from having such freedom of choice, the Rules on Containers harm the commerce of the United States. Board of Commissioners of the Port of New Orleans, supra.

On the basis of our findings and conclusions in this Report, the Commission orders the respondent carriers to remove Rules 1 and 2 of the Rules on Containers from their tariffs. Under the guidelines of Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962), the possible imposition of civil penalties on the carriers already has been removed from this proceeding and the range of remedies narrowed to a cease and desist order. In addition, the effective date of this order will be delayed for 90 days, consistent with the initial decision in Sea-Land, 21 F.M.C. at 35. The period of 90 days also gives the 60-day period

for renegotiation contemplated by the carriers and the ILA and set forth in Rule 8 of the Rules on Containers a full opportunity to work, and gives the carriers as many as 30 more days to take whatever steps are necessary after the renegotiations are completed. This remedy serves the public interest and will avoid any unnecessary disruption of the collective bargaining process by giving the parties ample time to accommodate the ILA's interests in some manner other than the present Rules on Containers.

THEREFORE, IT IS ORDERED, That the Presiding Officer's Initial Decision is hereby reversed;

IT IS FURTHER ORDERED, That Rules 1 and 2 of the Rules on Containers are hereby found to be unlawful and violative of sections 14 Fourth, 16 First, 17, second paragraph, and 18(a) of the Shipping Act, 1916, sections 10(b)(6)(C), 10(b)(11)-(12) and 10(d)(1) of the Shipping Act of 1984, and section 4 of the Intercoastal Shipping Act, 1933;

IT IS FURTHER ORDERED, That the carriers listed in Appendix A hereto shall, within 90 days from the date of this order, cease and desist from publishing in their tariffs and enforcing the provisions of Rule 1 and 2 of the Rules on Containers; and

IT IS FURTHER ORDERED, That this proceeding is hereby discontinued.

Joseph C. Polking
Secretary

APPENDIX A

ABC Container Line N.V.
One Harmon Plaza, 5th Floor
Secaucus, NJ 07094

Agromar Lines
c/o Gulf and Eastern
29 Broadway
New York, NY 10006

Alcoa Steamship Co., Inc.
P.O. Box 2568
Mobile, AL 36652

American Atlantic Lines
c/o Chester Blackburn &
Roder, Inc.
1775 Northwest 70th Avenue
Miami, FL 33126

Armasal Line
c/o Smith and Johnson
(Gulf) Inc.
509 Julia Street
New Orleans, LA 71130

Atlantic Cargo Services, AB
One World Trade Center
Suite 3811
New York, NY 10048

Atlantic Container Line, Ltd.
80 Pine Street
New York, NY 10005

Atlanttrafik Express
370 Lexington Avenue
New York, NY 10017

Bangladesh Shipping Corp.
c/o Peralta Shipping Corp.
25 Broadway
New York, NY 10004

The Bank & Savill Line
c/o Boyd, Weir & Sewell, Inc.
17 Battery Place
New York, NY 10004

Bank Line, Ltd.
c/o Lavino Shipping Agencies,
Inc.
26 Broadway
New York, NY 10004

Barber Blue Sea Line
Barber Steamship Lines Inc.
17 Battery Place
New York, NY 10004

Bermuda Container
c/o Norton, Lilly & Company,
Inc.
200 Plaza Drive, Harmon Meadow
Secaucus, NJ 07094

Bottachi Line
17 Battery Place
New York, NY 10004

Box Lines
17 Battery Place
New York, NY 10004

CCT
1533 Sunset Drive
Coral Gables, FL 33143

Crowley Caribbean Transport
P.O. Box 430960
Miami, FL 33143

Chilean Line
1 World Trade Center
Suite 3861
New York, NY 10048

CMA
c/o TTT Ship Agencies
71 Broadway
New York, NY 10006

Columbus Line, Inc.
One World Trade Center
Suite 3247
New York, NY 10048

Compagnie Generale
Transatlantique; French Line
25 Broadway, Suite 1006
New York, NY 10004

Compagnie Maritime Zairoise
c/o Roberts Steamship Agency
500 ITM Bldg.
New Orleans, LA 70130

Compagnie Nationale Algerienne
De Navigation
c/o TTT Ship Agencies, Inc.
71 Broadway
New York, NY 10006

Companhia De Navegacao
Loide Brasileiro
17 Battery Place
New York, NY 10004

Companhia De Navegacao
Maritima Netumar
26 Broadway
New York, NY 10004

Compania Peruana de Vapores
c/o Tilston Roberts
17 Battery Place
New York, NY 10004

Compania Trasatlantica
Espanola, S.A.; Spanish Line
39 Broadway
New York, NY 10006

Concorde Line
c/o Norton, Lilly & Co., Inc.
90 West Street
New York, NY 10006

Concordia Line
c/o Boise-Griffin-Steamship
Co., Inc.
One World Trade Center
Suite 3811
New York, NY 10048

Constellation Line
c/o Constellation Navigation,
Inc.
233 Broadway, Suite 640
New York, NY 10007

Contract Marine Carriers, Inc.
1201 Corbin Street,
Port Elizabeth
Elizabeth, NJ 07201

Costa Line
Cargo Services, Inc.
26 Broadway
New York, NY 10004

Dampskibsselskabet Torm A/S;
Torm Lines
c/o Peralta Shipping Corp.
25 Broadway
New York, NY 10004

Dart Containerline Co., Ltd.
Dart Orient Services, Inc.
5 World Trade Center
New York, NY 10048

Delta Steamship Lines, Inc.
P.O. Box 50250
New Orleans, LA 70150

Ecuadorian Line, Inc.
19 Rector Street
New York, NY 10006

E.L.M.A.
c/o Nedlloyd, Inc.
5 World Trade Center
Suite 617
New York, NY 10048

Egyptian National Line
c/o Uiterwyk Corp.
90 West Street
New York, NY 10006

Evergreen Line
Evergreen Marine Corp.
1 World Trade Center
New York, NY 10048

Farrell Lines
One Whitehall Street
New York, NY 10004

Flomerca Line
c/o Kerr Steamship Co., Inc.
1 Market Plaza, Suite 2400
Spears St. Tower
San Francisco, CA 94105

Forest Lines
19 Rector Street
New York, NY 10006

Frota Amazonica S.A.
c/o Omnium Agencies, Inc.
42 Broadway
New York, NY 10004

Galleon Shipping Corp.
c/o Trans Asia Marine Corp.
60 Broad Street
New York, NY 10004

Galapagos Line, S.A.
c/o Boyd, Weir & Sewell, Inc.
17 Battery Place
New York, NY 10004

G.B.S. Line, Ltd.
c/o Phillips-Parr, Inc.
1642 International Trade Mart
New Orleans, LA 70130

Grancolombiana
One World Trade Center
Suite 1667
New York, NY 10048

Gulf Europe Express
c/o Barber Steamship
Lines, Inc.
17 Battery Place
New York, NY 10004

Hafskip, Ltd.
66 Reade Street
New York, NY 10007

Hapag Lloyd AG
3 Harbor Drive
Sausalito, CA 94965

Hellenic Lines Ltd.
39 Broadway
New York, NY 10006

Hoegh Lines
1999 Harrison Street
Suite 930
Oakland, CA 94612

Holland Pan-American Line
c/o Constellation Navigation
Inc.
233 Broadway, Suite 640
New York, NY 10007

Ibero Lines
c/o Box Line Shipping Co.,
Ltd.
17 Battery Place
New York, NY 10004

Iceland Steamship Co., Ltd.
c/o A.L. Burbank and Co., Ltd.
2000 Seaboard Avenue
P.O. Box 7067
Portsmouth, VA 23707

Imparca Express
330 Biscayne Blvd.
Miami, FL 33132

Italian Line
One Whitehall Street
New York, NY 10004

Ivaran Lines
One Exchange Plaza
New York, NY 10006

Japan Line (U.S.A.), Ltd.
1 World Trade Center
Suite 2867
New York, NY 10048

Jeco Shipping Line
c/o Combined Maritime
Agencies, Inc.
Suite 2100
50 Broadway
New York, NY 10004

Jugolinija
c/o Crossocean Shipping
Co., Inc.
One World Trade Center
Suite 2045
New York, NY 10048

K Line
c/o Kerr Steamship Agencies
2 World Trade Center
99th Floor
New York, NY 10048

Kirk Line
c/o Eller & Company, Inc.
3000 Biscayne Blvd.
Miami, FL 33137

Koctug Line
c/o United States Navigation,
Inc.
One Edgewater Plaza
Staten Island, NY 10305

Korea Shipping Corp., Ltd.
c/o Korea Shipping America, Inc.
71 Broadway
New York, NY 10006

Lignes Centrafricaines
c/o Oceans International Corp.
1314 Texas Avenue
Suite 1112
Houston, TX 77002

Linea Manaure C.A.
3000 Biscayne Blvd.
Miami, FL 33137

Lykes Bros. Steamship Co., Inc.
300 Poydras Street
New Orleans, LA 70130

Maersk Line
Moller Steamship Company, Inc.
One World Trade Center
Suite 3527
New York, NY 10048

Mar Chile Line
c/o TTT Ship Agents, Inc.
71 Broadway
New York, NY 10006

Maritime Company of the Philippines
c/o North American Maritime Agencies
17 Battery Place
New York, NY 10004

Medafrica Line
22 Cortlandt Street
New York, NY 10007

Mexican Line
c/o Norton, Lilly & Co., Inc.
200 Plaza Drive, Harmon Meadow
Secaucus, NJ 07094

Mitsui O.S.K. Lines, Ltd.
One World Trade Center
Suite 2211
New York, NY 10048

Moore-McCormack Lines
27 Commerce Drive
Cranford, NJ 07016

Nacional Line
c/o Norton, Lilly & Co.
200 Plaza Drive, Harmon Meadow
Secaucus, NJ 07094

Namucar Line
c/o Tilston Roberts Corp.
17 Battery Place
New York, NY 10004

Naviera Central, C.A.
c/o TMT Corp.
P.O. Box 2110
Jacksonville, FL 32203

Nedlloyd Lines
5 World Trade Center
Suite 617
New York, NY 10048

Neptune Orient Lines, Ltd.
300 Montgomery Street
San Francisco, CA 94104

Nigeria America Line
c/o Crossocean Shipping Co., Inc.
One World Trade Center
Suite 2045
New York, NY 10048

Nigeria Star Line
c/o Mediterranean Agencies
One World Trade Center
Suite 2969
New York, NY 10048

Nippon Yusen Kaisha
333 Market Street
San Francisco, CA 94105

Nopal Lines
c/o Lorentzen Shipping
2125 Biscayne Blvd.
Miami, FL 33137

Nordana Line
c/o Barber Steamship Lines, Inc.
17 Battery Place
New York, NY 10004

Ocean World Lines
9 Murray Street, Suite 11-E
New York, NY 10007

Orient Overseas Container Line
c/o Dart Orient Services, Inc.
5 World Trade Center
New York, NY 10048

P.A.C.E. Line
One World Trade Center
Suite 8101
New York, NY 10048

Pakistan National Shipping Corp.
c/o Crossocean Shipping Co.
Suite 2045
One World Trade Center
New York, NY 10048

P & O Strath Services
Two Rector St, Suite 2208
New York, NY 10006

Polish Ocean Lines
One World Trade Center
Suite 3557
New York, NY 10006

Portuguese Line C.T.M.
c/o Tilston Roberts Corp.
17 Battery Place
New York, NY 10004

Prudential Lines, Inc.
One World Trade Center
Suite 3701
New York, NY 10048

Puerto Rico Maritime Shipping Authority
c/o Puerto Rico Marine Management, Inc
Raritan Center Plaza One
Edison, NJ 08818

Rocargo, C.A.
c/o Lorentzen Shipping
2125 Biscayne Blvd.
Miami, FL 33137

Ro-Lo Pacific Line
c/o Trans-American Steamship Agency Inc.
100 California Street
San Francisco, CA 94108

Royal Netherlands Steamship Co.
Five World Trade Center
Suite 7411
New York, NY 10048

Salen Dry Cargo
DBA Salen Project/Liner Services
c/o International Consultants, Inc.
17 Battery Place, Suite 1930
New York, NY 10004

Saudi Concordia Shipping Co., Ltd.
c/o Boise-Griffin Steamship Co., Inc.
One World Trade Center
New York, NY 10048

Saudi National Lines
c/o Costa Line Cargo Services, Inc.
26 Broadway
New York, NY 10004

Scindia Steam Navigation Co., Ltd.
c/o U.S. Navigation, Inc.
One Edgewater Plaza
Staten Island, NY 10305

Sea-Land Service, Inc.
10 Parsonage Road
P.O. Box 800
Iselin, NJ 08830

Shipping Corp. of India, Ltd.
c/o Norton, Lilly & Co., Inc.
200 Plaza Drive, Harmon Meadow
Secaucus, NJ 07094

South African Marine Corp., Ltd.
One Bankers Trust Plaza
New York, NY 10006

Span-Chile Line
5 World Trade Center
Suite 617
New York, NY 10048

Surinam Line
c/o Hansen & Tidemann, Inc.
Agents
One Greenway Plaza, Suite 1000
Houston, TX 77046

TMS Line
c/o Trans Marine Shipping Corp.
29 Broadway
New York, NY 10004

Trans Caribbean Lines
3301 N.W. South River Drive
Miami, FL 33142

Trans Freight Lines
65 Willowbrook Boulevard
Wayne, NJ 07470

Transnave-Transporte Navieros Ecuatorianos
c/o U.S. Navigation, Inc.
One Edgewater Plaza
Staten Island, NY 10305

Trikora Lloyd
c/o Kerr Steamship Company, Inc.
2 World Trade Center
New York, NY 10048

Uiterwyk Shipping Lines
c/o Uiterwyk Corporation
3105 West Waters Avenue
Tampa, FL 33614

United Arab Shipping Co. (S.A.G.)
c/o Kerr Steamship Co., Inc.
2 World Trade Center
99th Floor
New York, NY 10048

United States Lines, Inc.
27 Commerce Drive
Cranford, NJ 07016

U.S. Africa Line
c/o East Coast Overseas
80 Broad Street
New York, NY 10004

Venezuelan Line
One World Trade Center
Suite 2073
New York, NY 10048

Waterman Steamship Corp.
120 Wall Street
New York, NY 10005

Westwind Africa Line, Ltd.
c/o Southern Star Shipping Co., Inc.
245 Park Avenue
New York, NY 10017

Yamashita Shinnihon Steamship Co.
c/o Stanley Levy
550 Kearny Street
San Francisco, CA 94108

Yangming Marine Transport Corp.
c/o Solar International Shipping Agency
Two World Trade Center
Suite 2264
New York, NY 10048

Zim Israel Navigation Co., Ltd.
One World Trade Center
Suite 2969
New York, NY 10048